No. 87-650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WALTER L. NIXON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, applying the principles of *Bronston v. United States*, 409 U.S. 352 (1973), a perjury conviction may be based upon a response to an ambiguous question when the response was literally true under a reasonable understanding of the ambiguous question.

2. Whether, under *Bronston*, a perjury conviction can be sustained when the prosecution has not proved the truth assertions in the indictment or that the testimony was not literally true.

3. Under Fifth Circuit Rule 35.6, petitioner could secure a rehearing en banc only by vote of an absolute majority of that court's fourteen active judges, but eleven judges were disqualified. Does the impossibility of en banc review deprive petitioner of his equal protection and due process rights to appellate review and thereby justify either (i) invocation of the Rule of Necessity to void the disqualifications or (ii) remedial action under this Court's supervisory powers?

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Walter L. Nixon, Jr. hereby petitions for issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Fifth Circuit in *United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987), and its denial of rehearing and rehearing en banc on September 8, 1987.

OPINIONS BELOW

The decision of the court of appeals on the petition for rehearing and suggestion for rehearing en banc (Pet. App. A, pp. 1a to 8a, *infra*) was entered on September 8, 1987. The panel decision of the court of appeals (Pet. App. B, pp. 9a to 28a, *infra*) is reported at 816 F.2d 1022 (5th Cir. 1987). The decision of the District Court on motions for judgment of acquittal and new trial (Pet.

App. C, pp. 29a to 41a, *infra* was filed on April 11, 1986, and is unreported.

JURISDICTION

The decision of the court of appeals was issued on April 30, 1987. A timely petition for rehearing and suggestion for rehearing en banc was denied on September 8, 1987. On September 21, 1987, the court of appeals entered an order staying issuance of the mandate for 30 days, until October 21, 1987. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

With respect to Questions One and Two, section 1623 of Title 28, U.S. Code, concerning false declarations before a grand jury, is reproduced in Pet. App. D, pp. 42a to 43a, *infra*. With respect to Question Three, Sections 46(c), 291(a), 294(c), and 296 of Title 28 U.S. Code and Fifth Circuit Rule 35.6 are reproduced in Pet. App. D, pp. 43 to 45a.

STATEMENT

Petitioner, who has served since 1968 as a United States District Judge for the Southern District of Mississippi, was indicted in August 1985 on one count of accepting an illegal gratuity and three counts of giving false testimony to a grand jury investigating that matter. In February 1986, petitioner was acquitted of the gratuity charge, and was acquitted on one of the false statement counts. He was convicted, however, on two false testimony counts and was sentenced to concurrent five-year terms of imprisonment.

The testimony alleged to be false consisted of (i) Nixon's denial that a State prosecutor, Bud Holmes, had discussed "the Drew Fairchild case" with him, and (ii) a statement volunteered at the conclusion of his testimony that he had not talked to anyone to influence the

Drew Fairchild case. The trial evidence established that Nixon had one conversation with Holmes in which State charges against Drew Fairchild were mentioned, but never talked to Holmes about a federal case involving Drew Fairchild which was a primary focus of the grand jury inquiry. If the questions and answers are understood to refer to the federal case against Drew Fairchild—a reasonable construction, given the ambiguity of the questioning and the context of the testimony—then Nixon's answers were absolutely true.

1. *The Investigation: Nixon's Investment With Wiley Fairchild*

The grand jury investigation focused on Nixon's 1980 investment in three oil properties held by Wiley Fairchild ("Wiley"). Nixon, who has seven children, asked friends about possible investments. Tr. 1451-53, 1472-75. In 1979 he discussed with a long-time acquaintance, Carroll Ingram, about possibly investing with Wiley. Tr. 1476-77.

After consulting with Wiley, Ingram reported that Nixon could invest in three oil properties for $9,500. Tr. 1483-84; 1036-37.[1] The relevant deeds were not executed until February 1981, but were dated February 1980, when the agreement had been reached. Tr. 1044, 1118, 1053, 593-94. Although no trial witness suggested any sinister reason for that delay, the backdating prompted unfounded allegations by a disgruntled former employee of Wiley's that Wiley had bribed Nixon to help Wiley's son, Drew Fairchild ("Drew"), who was 52 years old at the time of trial. Tr. 298-301.

2. *Drew Fairchild's Legal Problems*

Drew's legal problems began in August 1980 when federal agents seized a plane full of marijuana at the

[1] Wiley took promissory notes from Nixon for the initial price, and Nixon paid the notes in 1982. Tr. 1519, 1527. Two of the three oil properties turned out to be profitable, while the third was unsuccessful.

Hattiesburg Airport. Drew was not among those indicted by the federal grand jury on August 19, 1980, but he discussed his fear of criminal charges with a lawyer, Bill Porter. Porter set up a meeting with Paul ("Bud") Holmes, the local district attorney. Tr. 137-40.

Holmes recommended that Drew try to cut a deal with the U.S. Attorney in Jackson, George Phillips, and arranged an appointment with the U.S. Attorney. Drew and Phillips agreed to a plea bargain calling for five years of probation and a $15,000 fine, which was set forth in a memorandum dated November 19, 1980. Ex. G-2; Tr. 141-44.

Four months later, Porter sued Drew for a $10,000 fee allegedly due for handling the plea bargaining. Ex. D-1. In July 1981, Wiley paid Porter $2,669.19, Ex. D-2, but Porter remained dissatisfied and complained to Bud Holmes about the unpaid fee. Tr. 732-34, 796, 837.

Incredibly, Holmes offered to prosecute Drew to help collect Porter's fee. He called U.S. Attorney Phillips and asked to take over Drew's case, since state and federal authorities both had jurisdiction. Tr. 732. Holmes admitted that collecting Porter's fee was "the primary motive" for taking over Drew's case, Tr. 845, 936, and said he explained that motive to the U.S. Attorney. Tr. 732. At the time Holmes took over the case, the U.S. Attorney had concluded that Drew had breached the plea agreement by not cooperating truthfully. Tr. 218-21.

On August 26, 1981, Drew was indicted by a state grand jury. Wiley got the message. On September 3, Drew was arraigned in state court and Wiley paid Porter $7,500. Ex. D-3; Tr. 848-49.

Even though the U.S. Attorney thought Drew had breached the federal plea agreement, Holmes agreed to a similar plea bargain. Drew pled guilty in state court in January 1982, but sentencing was delayed by court order on five occasions in 1982 so Drew could testify

against the pilot of the seized plane, who was then a fugitive. Tr. 851-58, 861-62; Ex. G-6. The FBI located the pilot in Florida in October and extradition proceedings began. Tr. 1343-44.

On December 23, 1982, District Attorney Holmes moved in state court to have Drew's case "passed to the files," which tolls the state requirement that sentencing be completed in a reasonable time. Tr. 858-59. At trial, Holmes gave several reasons for his action. The "big motivating thing," he explained, was that the local state judge was about to be replaced by a political adversary of Drew's lawyer, Bill Porter (Tr. 754):

> Judge McKenzie was going to be able to have the power to totally ignore any kind of plea bargain we had and go ahead and sentence him to the full 5 years . . . . Bill [Porter] was afraid that's exactly what Dickie was going to do, Judge McKenzie was going to do. So he was fussing about it.

Holmes testified that passing a case to the files is a legally meaningless act, Tr. 924, and the federal prosecutor told the jury "it was a legally absurd, pointless gesture." Tr. 1853. Thirty-three days after Drew's case was passed to the files, the fugitive pilot was returned to Mississippi and Drew's case was restored to the active docket. Ex. D-7, [A-59-62]; Tr. 755.

3. *Nixon Learns About Holmes' Blackmailing*

Wiley was distressed that Porter and Holmes had extorted the fee from him. After Wiley paid Porter's fee, he was visited by Robert Royals, one of the alleged marijuana smugglers and a "very close friend" of Bill Porter's. Tr. 151, 626. Royals told him that Porter had said that "if Drew will get up off his money he'd come clear of this thing," and that "if [Drew's] old man had knew his son got his tail in the crack, he'd get up off his money." Tr. 480, 626.

Some time later, Wiley told Nixon "that they [including Holmes] was trying to blackmail me and I wasn't going to be blackmailed." Tr. 484. Wiley recalled telling Nixon, "if they will go ahead and prosecute Bob Royals, they won't hear a damn word out of me. He's guilty and my son's guilty, but I just don't like them picking on my son because I got money." *Id.* Wiley said that Nixon said nothing in response, Tr. 484, and that he never asked Nixon to do anything for him. Tr. 641, 543.

Nixon had been scheduled to visit Holmes' farm later that day. Tr. 1530. According to Holmes,[2] Nixon said, "Bud, I never would have asked you to do anything against your oath of office, never ask you to do anything embarrassing to you, wouldn't ask you to do anything wrong." Tr. 736-38. Holmes continued (*id.*):

> [Nixon] said, I was out at Mr. Fairchild's and he asked me to put in a good word for his boy, or would I say something to you about Drew. —I think, I don't think he said Drew, I think he said his boy. I said, you know, well, I don't know. I don't know. What is it you want? You want an apology? I don't know. What does the man want?
>
> Q. Are you saying did you say that to Judge Nixon?
>
> A. Yeah, that was about my response. I can't remember this, because as I recall this was like in May of 82, you know, when this occurred. But that was about my response, I mean, I was feeling rich and good-looking and, you know, that would have been my typical type answers.

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[2] Nixon's description of this conversation conflicted in several material respects from that of Holmes, who was indicted on four perjury counts and one count of obstruction of justice. He pled guilty to a contempt charge. For this Petition, however, we must take Holmes' testimony as true.

Under a different plea bargain, Wiley Fairchild pled guilty to paying an illegal gratuity to Nixon, Tr. 710, the substantive charge on which Nixon was acquitted.

> He said I'm not asking you to do anything. I'm just saying that Mr. Fairchild asked me to put in a good word.
>
> * * * *
>
> So I took it on myself, said, well, judge, hell, I'm district attorney, I'll pass it to the files. And he said no, I'm not asking you to do that. Now, I'm not asking you to do anything now.

Holmes told Nixon that he had worked out a plea bargain with Drew. Tr. 739. Holmes said that Nixon asked if Wiley knew about the plea bargain, and Nixon then told Wiley about it on the telephone. *Id.*

Holmes then told Wiley that "I want Judge Nixon to have credit for helping the boy." Tr. 740. Holmes testified that he was "misleading" Wiley "because I already had the arrangement worked out with Bill Porter." *Id.* Holmes claimed that he also told Wiley that he would pass Drew's case to the files, *id.*, although Wiley denied that Holmes made that statement. Tr. 663. Holmes admitted at trial, however, that Nixon had not asked him to pass the case to the files. Tr. 739-40. Seven months later, Drew's case was passed to the files, and Holmes said that the telephone conversation with Wiley was one of the reasons for his actions. Tr. 751-52.[3]

4. *Interviewing Nixon: April 1984*

In April 1984, Wiley's former employee made two false allegations to a federal prosecutor: that Nixon's investment had been tied to Drew's federal plea bargain and that Nixon had steered Drew's federal case to state

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[3] Carroll Ingram, who helped set up Nixon's investment, testified that Nixon said he had talked to Bud Holmes about Drew at Wiley's request. Ingram testified that Nixon never said why he talked to Holmes, and that "it was really a passing comment, an understated thing that wasn't a full discussion about it." Tr. 1070. Ingram's testimony thus adds nothing to Holmes' description of the conversation with Nixon.

court. Tr. 316-18, 347. On the following day, Nixon was interviewed. (Appendix F includes excerpts of the interview transcript.) After spending more than half of the interview on the investment, the prosecutor focused Nixon's attention on the federal role in prosecuting Drew (Pet. App. E, pp. 46a-47a) (emphasis added)

> Prosecutor: Now, the obvious question, Judge, did [Bud Holmes] ever discuss the DREW FAIRCHILD drug case with you?
>
> Nixon: Not to my recollection. I think I would recall it—
>
> * * * *
>
> Prosecutor: I tell you that ah, the airport bust was August, 1980. Ah, that, *I tell you that originally the case was a federal case, got passed to HOLMES.*
>
> Nixon: *How did it get passed, what, what happened?*
>
> Prosecutor: Well—
>
> Nixon: I don't know anything about it—
>
> Prosecutor: Frankly, that's—
>
> Nixon: I'm, I'm interested. I'm curious—
>
> Prosecutor: *Frankly, that's a very good question, and it's quite a ah, what we're looking at here. . . .*

When Nixon asked "exactly what it is alleged that I'm supposed to have done or not done," the prosecutor responded that he had "no information" that "the case was in your court, that you did anything wrong with it." *Id.* at 49a. The prosecutor explained that Drew's co-conspirators were indicted on federal charges, but "DREW FAIRCHILD was never indicted. His case got picked up by HOLMES, as I explained." *Id.* at 50a.

The interviewers described Drew's federal plea bargain and the transfer of Drew's case to Holmes. Nixon responded, "Well I'm puzzled. I, I just don't know any-

thing about it. I, I'm, I'm, I'm learning something about it now." *Id.* Nixon then asked again about the transfer of Drew's case to state authorities. *Id.* at 52a.

5. *Grand Jury Testimony*

Nixon voluntarily appeared before the federal grand jury in July 1984, and the questioning again focused on the investment. When Nixon was asked about the federal proceedings before Judge Cox concerning Drew's co-conspirators (Pet. App. F at 56a), he replied that he knew nothing about those cases.

The prosecutor pointed out that Drew was indicted by the state, thereby directing Nixon's attention to how Drew's case ended up in state court. *Id.* at 55a-56a. After exploring Nixon's hazy recollection that there was criticism of the state's conduct of Drew's case, the prosecutor asked whether Holmes "ever discuss[ed] the Drew Fairchild case with you"? *Id.* at 56a-57a. Nixon responded that he did not recall such a discussion. *Id.* at 57a.

After answering several questions concerning contact with Wiley or the U.S. Attorney about Drew, Nixon explained that the Justice Department, not a federal judge, determines who is prosecuted "in federal court." *Id.* at 59a. Again, the testimony reflected Nixon's understanding that the prosecutor's questions concerned why Drew was not indicted in federal court.

Towards the end of his testimony, Nixon was asked if he had "anything you want to add." Nixon made a lengthy and emotional statement which included two sentences that were the basis for the second perjury conviction. *Id.* at 60a-62a.

Finally, Nixon reiterated that he thought the questioning had related to the "handling" of Drew's case in federal court or by federal authorities, since that "would be

the only possible charge of a crime herein, federal crime." *Id.* at 63a. Nixon plainly had in mind the gratuities statute (18 U.S.C. § 201(g)), which would be violated only if he had interfered with federal action concerning Drew.[4]

6. *Acquitted On Two Counts And Convicted On Two Counts*

Nixon was charged with one count of receiving an illegal gratuity and three false testimony counts (18 U.S.C. § 1623). The jury acquitted on the substantive count and one of the perjury charges, while convicting on the other two perjury counts. The convictions were based on the following grand jury testimony.

Count III

> "Q. Did [Bud Holmes] ever discuss the Drew Fairchild case with you?
>
> "A. No, not to the best of my recollection. I think I would recall if he had."

Count IV:

> "Now, I have had nothing whatsover officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court . . . . I never handled any part [of the Drew Fairchild drug case], never had a thing to do with it at all and never talked to anyone, state or federal, prosecutor or judge, in any way [to] influence anybody with respect to this case."

The trial court[5] refused to give two instructions requested by Nixon to address the ambiguity of the ques-

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[4] The jury instructions specified that the gratuities statute could not be violated by influencing an action in state court such as Holmes' passing Drew's case to the files. Tr. 2090.

[5] Senior District Judge James H. Meredith of the Eastern District of Missouri, sitting by special designation under 28 U.S.C. § 294(d).

tioning, Tr. 1832, and also denied Nixon's motion for judgment of acquittal on grounds of sufficiency of the evidence. Tr. 1831; Pet. App. C at 29a. Nixon was sentenced to five years in prison on each count, to run concurrently.

The court of appeals affirmed on April 30, 1987. The panel opinion devoted a surprising amount of attention to Count I of the indictment, the gratuities charge on which Nixon was acquitted. Pet. App. B at 10a-12a. The panel dealt glancingly with the prosecutor's ambiguous questioning, holding that the questioning was clear in light of the "natural meaning" of the words used. *Id.* at 24a-25a.

On receiving Nixon's suggestion for rehearing en banc, the Fifth Circuit disclosed that eleven of its fourteen active judges had disqualified themselves. The court invited a memorandum on its Rule 35.6, which provides that rehearing en banc can be ordered by majority vote of the active judges (or eight judges). With only three judges participating, rehearing en banc was an impossibility. The original panel issued a *per curiam* opinion on September 8, 1987 rejecting each of Nixon's suggestions for establishing a meaningful en banc review process in this case. Pet. App. A.

SUMMARY OF THE ARGUMENT

1. *Bronston v. United States*, 409 U.S. 352 (1973), held that a perjury conviction cannot be based upon misleading testimony that is literally true. The Court ruled that "[p]recise questioning is imperative as a predicate for the offense of perjury," holding that "a jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner." *Id.* at 362, 359.

Bronston expressly reserved the first question raised in this Petition: Whether a perjury conviction may be

based upon a response to an ambiguous question, when the response was literally true under a reasonable understanding of the question. Since *Bronston*, a sharp conflict has developed on this question. Five circuits have ruled that perjury charges may not be based upon answers to ambiguous questions, but four circuits allow juries to decide whether an answer to an ambiguous question was intentionally false.

The question that is the basis for Count III—"Did [Bud Holmes] ever discuss the Drew Fairchild case with you?"—is fundamentally ambiguous. In the context of the prosecutor's questioning, the "Drew Fairchild case" could refer to federal proceedings, or to state proceedings, or to both.

The prosecutor focused Nixon's attention on the transfer of Drew's case from federal to state authorities. Nixon's statements reflect his understanding that the investigation concerned whether he had taken any federal "official act" in return for the investment with Wiley. With that understanding, Nixon's testimony was literally true, since there is no evidence that Bud Holmes discussed with Nixon any federal proceeding concerning Drew Fairchild.

The same policy considerations that controlled *Bronston* apply here. If witnesses face perjury convictions for misunderstanding ambiguous questions, witnesses will be deterred from coming forward and the judicial system may be impaired, a concern that "is far paramount to that of giving even perjury its just deserts." *Bronston*, at 359 (*quoting* W. Best, Principles of the Law of Evidence § 6.06 (C. Chamberlayne ed. 1883)).

The testimony that is the basis for Count IV of the indictment responded to the open-ended inquiry, "Judge, do you have anything to add?" The ambiguity of the previous question infected this charge, since Nixon's lengthy statement in reply was a summary of his previous testimony.

2. The testimony cited in Count IV was literally true under *Bronston*, and the government failed to prove the "truth" assertion in Count IV that Nixon "sought to influence" the "Drew Fairchild drug case by asking state prosecutor Paul H. 'Bud' Holmes to do what he could for Drew Fairchild and thereby handle the case in a way that would please Wiley Fairchild." Because there was no evidence that Nixon attempted to influence Holmes' handling of Drew's prosecution and because the testimony was literally true, the conviction on Count IV cannot stand under *Bronston*.

3. Under Fifth Circuit Rule 35.6, petitioner had no chance of securing a rehearing en banc with 11 of the 14 judges disqualified. Although no party has a right to rehearing en banc, every party—especially a criminal defendant—is entitled to have his en banc suggestion reviewed by judges who are empowered to grant en banc review. Three circuits do not follow the "absolute majority" approach, but allow en banc rehearings upon the vote of a majority of the nonrecused judges.

The Fifth Circuit's arbitrary rule denied Nixon his equal protection and due process rights. This Court will exercise its supervisory powers to ensure that local rules are "consistent with 'the principles of right and justice.'" *Frazier v. Heebe*, 107 S.Ct. 2607, 2611 (1987), *citing In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring). Either the judicial disqualifications are void under the Rule of Necessity or this Court should direct meaningful review of the en banc suggestion pursuant to 28 U.S.C. §§ 294(c), 296, and 291(a).

ARGUMENT

A. Perjury May Not Be Based On A Response To An Ambiguous Question When The Response Was Literally True Under A Reasonable Understanding Of The Question

In *Bronston*, the defendant argued that because "the key question was imprecise and suggestive of various interpretations," his testimony was truthful under a reasonable understanding of the question. The Court observed that "the problem of the ambiguity of the question is not free from doubt, but we need not reach that issue." 409 U.S. at 356. The Court held instead that the testimony, even though misleading, was literally true and could not support a perjury conviction.

Bronston emphasized that stringent standards must be applied to perjury prosecutions. Admitting that the defendant's statements might be understood as false if made "in casual conversation," the Court cautioned, "But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true." *Id.* at 357-58 (emphasis in original).

Bronston noted several reasons for subjecting perjury charges to exacting standards. *First*, witnesses under oath are nervous and prone to testimonial mistakes that should not create criminal liability (*id.* at 358):

> Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it.

Second, in an adversarial setting the questioner bears primary responsibility for eliciting precise and responsive testimony (*id.* at 358-59): "It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-

examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."

Third, the jury should not speculate as whether the witness intended to mislead the questioner. "A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner." *Id.* at 359. Any other approach would "inject a new and confusing element," leaving witnesses "unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners" and vulnerable to liability for " 'perjury by implication.' " *Id.* at 359.

Fourth, perjury prosecutions are "not the sole, or even the primary, safeguard against errant testimony." *Id.* at 360. Rather, adversarial questioning is the central device for finding the truth. Loose application of the perjury statute could deter witnesses from coming forward. *Id.* at 359-60. *Cf. Weiler v. United States*, 323 U.S. 606, 609 (1945).

The lower courts have divided sharply on the "problem of the ambiguity of the question" reserved in *Bronston.*

Five circuits and at least two state supreme courts have ruled that perjury charges based on ambiguous questions must be dismissed by the Court. *United States v. Lighte*, 782 F.2d 367, 376 (2d Cir. 1986) (limited to "fundamentally" ambiguous questions); *United States v. Slawik*, 548 F.2d 75, 84-85 (3d Cir. 1977); *United States v. Eddy*, 737 F.2d 564, 570-71 (6th Cir. 1984); *United States v. Sainz*, 772 F.2d 559, 562-564 (9th Cir. 1985) ("witness cannot be forced to guess at the meaning of the question to which he must respond upon peril of perjury"); *United States v. Larranaga*, 787 F.2d 489, 497

& n.2 (10th Cir. 1986); *People v. Wills*, 71 Ill. 2d 138, 147 (1978); *State v. Browne*, 43 N.J. 321, 204 A.2d 346 (1964).

Three circuits and two state appellate courts agree with the Fifth Circuit that juries may decide perjury charges even when the question was ambiguous. *United States v. Chapin*, 515 F.2d 1274, 1280 (D.C. Cir.), *cert. denied*, 423 U.S. 1015 (1975); *United States v. Finucan*, 708 F.2d 838, 848 (1st Cir. 1983); *United States v. Bell*, 623 F.2d 1132, 1136 (5th Cir. 1980); *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977); *People v. Hoag*, 89 Mich. App. 603, 281 N.W. 2d 137, 140-41 (1979); *State v. Douglas*, 217 Neb. 199, 218, 349 N.W. 2d 870, 882 (1984).

Count III squarely presents the "problem of the ambiguity of the question." Throughout the April 1984 interview and the grand jury testimony, Nixon plainly understood the questioning to concern the federal handling of Drew's case, which was "the only possible charge of a crime herein, a federal crime." Pet. App. F at 63a. As the trial court instructed the jury, "nothing which was said or done with respect to the state criminal prosecution of Drew Fairchild would constitute the 'official act' underlying the federal offense of receiving an illegal gratuity . . . ." Tr. 2090.

When asked if Holmes had discussed the "Drew Fairchild case" with him, Nixon reasonably could have interpreted that question to ask whether there was a discussion of the federal proceeding or the transfer of the case to state authorities. Nixon truthfully replied "no" to that question. Indeed, it would have been false testimony for Nixon to state that Holmes had discussed with him the federal handling of Drew's case.[6]

[6] The term "discuss" in the question cited in Count III also was ambiguous, since for a lawyer it implies an extensive exploration of the issues of a case rather than the passing exchange that Holmes described in his testimony. *See* Webster's Third New International

The court of appeals denied that the question was ambiguous, claiming that the words used have a "natural meaning." Pet. App. B at 25a. But ambiguous questions ordinarily concern simple words like "Drew Fairchild's case." Perjury convictions have been reversed because questions contained simple but ambiguous terms like "stuff," *United States v. Finucan*, *supra*; "procedure," *Sainz*, *supra*; "handle," *United States v. Tonelli*, 577 F.2d 194 (3d Cir. 1978); "have," *United States v. Cowley*, 720 F.2d 1037, 1043 (9th Cir. 1983), *cert. denied sub nom. St. Clair v. United States*, 465 U.S. 1029 (1984); "vouch," *People v. Blumenthal*, 55 A.D. 13, 389 N.Y.S. 2d 579 (1976); "run," *State v. Cousins*, 4 Ariz. App. 318, 420 P.2d 185 (1966); and "notebook," *United States v. Razzaia*, 379 F. Supp. 577 (D. Conn. 1973).

The panel argued that the question must have been clear because Nixon answered "without hesitancy, evasion or qualification." Pet. App. B at 25a. But Nixon's lack of qualification establishes only that he did not realize that he might have misinterpreted the question. *People v. Wills*, *supra*, at 148 (in reversing perjury conviction due to ambiguous question, "it is of no consequence that the defendant's answers were unequivocally 'Never' and 'No' "); *Sainz*, *supra* (fatal ambiguity in questions answered "No"); *Eddy*, *supra* (same).[7]

Dictionary, 648 (16th ed. 1971) (defining "discuss" as "to investigate (as a question) by reasoning or argument; argue by presenting various sides of: DEBATE"). Nixon requested a jury instruction defining "discuss," but the trial court refused to give that instruction. Tr. 1832.

[7] The panel opinion also states that the clarity of the prosecutor's question was "amply demonstrated" by Nixon's "voluntary comments" that he had read about Drew's case in the newspaper. Pet. App. B at 25a. But Nixon testified that he did not recall the substance of newspaper coverage of the Drew Fairchild matter, Pet. App. F at 55a-57a, testimony that hardly establishes precision in the prosecutor's questioning.

Bronston teaches that a perjury prosecution is not a safe harbor for the prosecutor whose substantive case fails. The prosecutor must secure clear answers to clear questions. Many follow-up questions would have clarified Nixon's testimony, such as:

> Did you ever ask Bud Holmes about the transfer of Drew Fairchild's case from federal to state authorities? Did he ever tell you about that transfer?
>
> And you never talked with Bud Holmes about Drew's plea agreement with the U.S. Attorney? Did he ever tell you about Drew's plea agreement with the state authorities?
>
> Did you ever have a conversation with Bud Holmes about the decision to pass Drew Fairchild's case to the files?

But the prosecutor followed up neither the question cited in Count III nor the statements which were charged in Count IV.[8] *Bronston* insisted that it is the questioner's "responsibility" to "bring the witness back to the mark," and to "pin the witness down to the specific object of the questioner's inquiry." *Id.* at 358-59, 360. Indeed, the prosecutor not only failed to meet that standard, but also affirmatively laid the foundation for Nixon's misunderstanding through ambiguous questioning during the April interview and before the grand jury.

This Court should grant certiorari to decide the ambiguous question issue reserved by *Bronston.*

B. On Count IV, The Government Failed Under *Bronston* To Prove Either the Falsity of Nixon's Testimony Or The Truth Of The Truth Assertion

Count IV concerned three statements at the close of Nixon's grand jury statement, after the prosecutor asked,

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[8] In contrast, the prosecutor did ask follow-up questions in connection with the testimony charged in Count II. Pet. App. G at 68a. Notably, the jury acquitted Nixon on that charge.

"Judge, do you have anything to add?" Count IV asserts that in truth Nixon "sought to influence the [Drew Fairchild] case by asking [Holmes] to do what he could for Drew Fairchild and thereby handle the case in a way that would please Wiley Fairchild." Because the evidence failed to prove either the truth assertion or the falsity of Nixon's testimony, the conviction on Count IV is contrary to *Bronston.*

The truth assertion in a perjury indictment ensures that perjury is not used to punish testimony that is misleading or confused but literally true. In a perjury prosecution, "No guessing is tolerated and the indictment must set out the allegedly perjurious statements and the objective truth in stark contrast so that the claim of falsity is clear to all who read the charge." *United States v. Tonelli, supra,* at 195; *see United States v. Cowley, supra,* at 1043; *United States v. Finucan, supra,* at 846; *State of Keziah,* 258 N.C. 52, 127 S.E. 2d 784 (1962); *Commonwealth v. Karafin,* 224 Pa. Super. 449, 307 A.2d 327 (1973).

The record does not support the assertion in Count IV that Nixon "sought to influence" Bud Holmes to go easy on Drew and to please Wiley. Nixon and Wiley both testified that Wiley told Nixon only about Holmes' apparent blackmail, and Wiley said he did not ask Nixon to do anything. Tr. 482.

According to Holmes, Nixon stated that he would never ask Holmes to do anything "embarrassing," or "wrong," or "against your oath of office," and then mentioned Wiley's request that he put in a good word for Drew. Tr. 736. When Holmes supposedly offered to pass Drew's case to the files, Nixon told him not to do so. Tr. 738. But when Holmes pointed out Drew's preexisting plea bargain, Nixon was interested and told Wiley about it on the telephone. Tr. 739.

Thus, Nixon went to Holmes' farm troubled about Wiley's allegations of blackmail. He mentioned Wiley

and Drew, but emphasized that he was *not* asking Holmes to do anything. When Holmes proposed passing the case to the files, Nixon told him *not* to do it, and Nixon did not ask Holmes to handle the case in any particular way. All Nixon did was relay to Wiley the fact of Drew's plea bargain. With no proof of the truth assertion that Nixon "sought to influence" Holmes' handling of Drew's case, the conviction cannot stand.

Similarly, the government failed to prove that the statements cited in Count IV were false. Nixon testified, "I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case *in federal court or state court.*" Pet. App. F at 60a (emphasis added). The last phrase—"in federal court or state court"—must be read to modify the entire statement, and it is indisputable that Nixon played no role in Drew's case "in" any court. He was not counsel, prosecutor, judge, witness, informant, spectator, or involved in any other capacity. The statement is literally true.

Nixon then testified (*id.*):

> I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where—someone told me maybe Judge Russell handled one of the other defendants also and—but *I never handled any part of it, never had a thing to do with it at all* . . . .

This testimony accurately states that Nixon never handled the Drew Fairchild case in federal court, "never had a thing to do with it at all." Perhaps Judge Cox or Judge Russell handled the case in federal court, but Nixon stated that he did not. The statement is literally true.

Judge Nixon testified further (*id.* at 61a):

> . . . *and* [*I*] *never talked to anyone, state or federal, prosecutor or judge, in any way* [*to*] *influence anybody with respect to this case.*

In reaction to Wiley's blackmail allegation, Nixon had mentioned Wiley to Holmes and stated the fact that Wiley had asked him to put in a good word for Drew. Nothing in Holmes' testimony, however, establishes that Nixon intended to influence Holmes to go easy on Drew. In fact, every statement attributed to Nixon by Holmes was calculated to prevent Holmes from concluding that Nixon was trying to influence him.[9]

C. Either This Court's Supervisory Powers Or The Rule Of Necessity Should Be Invoked To Permit Meaningful Review Of Nixon's En Banc Suggestion

Under 28 U.S.C. § 46(c), a court en banc ordinarily "shall consist of all circuit judges in regular active service." Fifth Circuit Rule 35.6 provides that disqualified judges "nevertheless shall be counted as judges in regular active service" for determining whether a majority exists for rehearing en banc. Rule 35.6 required that eight judges vote for en banc rehearing in this case; because all but three judges disqualified themselves, for Nixon the en banc process was an illusion, providing no actual review.

The courts of appeals have a "wide latitude of discretion" in exercising the en banc power, which "is not addressed to litigants," but to the courts of appeals. *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 250, 259 (1953). *See Shenker v. Baltimore & Ohio R.*, 374 U.S. 1 (1963). Nevertheless, this Court has held that each circuit's en banc rules "should recognize the full scope of its power[] under § 46(c)," which is "too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate." *Western Pacific*, 345 U.S. at 261, 260.

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[9] It is irrelevant to the perjury charge that Holmes later claimed that the conversation with Nixon had some influence on his decision seven months later to pass Drew's case to the files. The issue for Count IV is not whether Nixon actually influenced Holmes—even inadvertently—but whether he attempted to do so.

Yet that is exactly what happened in this case due to the "absolute majority" requirement in Rule 35.6. The circuits are divided on this issue. Several share the Fifth Circuit's view, 2d Cir. R. 35; 8th Cir. R. 16(a); 6th Cir. Internal Operating Proc. § 18.5, *Zahn v. International Paper Co.*, 469 F.2d 1033, 1042 (2d Cir. 1972), *aff'd on other grounds*, 414 U.S. 291 (1973), while three circuits require only a majority vote of the *non*recused active judges. 4th Cir. R. 35(b); 7th Cir. Internal Operating Proc. § 5(d)(1); 10th Cir. R. 35.4; *see Arnold v. Eastern Air Lines*, 712 F.2d 899, 904 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984).[10]

The Due Process and Equal Protection Clauses require fairness in criminal appeals. *See Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963). *Evitts v. Lucey*, 105 S.Ct. 830 (1985), held that a criminal defendant is entitled under the Due Process Clause to "a fair opportunity to obtain an adjudication on the merits of his appeal," and is entitled under the Equal Protection Clause not to be treated "differently for purposes of offering them a meaningful appeal." *Id.* at 841. The Court wrote (*id.* at 834):

> [T]he Constitution does not require States to grant appeals as of right to criminal defendants . . . . Nonetheless, if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' *Griffin v. Illinois*, 351 U.S. at 18, the procedures used in deciding appeals must comport with the demands

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[10] Report of the Proceedings of the Judicial Conf. of the United States, p. 47 (1973); *Structure and Internal Procedures: Recommendations for Charge*, Commission on Revision of the Federal Court Appellate System, p. x (1975). *See generally*, Newman, "In Banc Practice In The Second Circuit: The Virtue Of Restraint," 50 Brooklyn L. Rev. 365, 368 (1984); Note, 70 Virginia L. Rev. 1505, 1511-20 (1984); Note, 20 Wake Forest L. Rev. 227 (1984); Note, 47 St. John's L. Rev. 345 (1972); Comment, 43 Fordham L. Rev. 401 (1974); Note, 11 J. Legis. 373 (1984).

of the Due Process and Equal Protection Clauses of the Constitution.

Rule 35.6 denied Nixon a fair opportunity to have his en banc suggestion reviewed, and treated his en banc suggestion differently from those of other criminal defendants. Although Nixon has no absolute right to en banc rehearing, he may not be denied meaningful review of the en banc suggestion. Because of the many recusals in this case, it is not sufficient simply to establish the nonrecused majority rule. Only three judges of the Fifth Circuit were not disqualified and two of them sat on the original panel. En banc review by those three judges does not provide a "fair opportunity" for meaningful appellate review.[11]

To meet this problem under Rule 35.6., the Rule of Necessity must void the disqualifications in this case.[12]

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[11] The *per curiam* opinion argued that because the three participating judges did not see a need for en banc review, the nonrecused majority rule "would avail appellant nothing." Pet. App. A at 4a. The opinion missed the point. It is unfair for all other defendants to have an opportunity to win en banc rehearing while Nixon is denied that opportunity.

The *per curiam* opinion also suggested that *Shenker v. Baltimore & Ohio R. Co., supra,* sustains Rule 35.6. Pet. App. A at 4a. *Shenker* concerned a purely statutory argument that en banc rehearing should have been ordered when four judges voted in favor, two voted against and two did not vote. The Third Circuit counted the non-voting judges as voting against rehearing, and this Court affirmed. In *Shenker,* however, at least the en banc suggestion was reviewed by enough judges that en banc rehearing was possible. Finally, *Shenker* did not present the constitutional concerns involved in a criminal proceeding.

[12] Petitioner offered to waive any disqualifications based on the discretionary standard in 28 U.S.C. § 455(e), which allows the parties to waive those recusals based on concern that the judge's "impartiality might reasonably be questioned," as provided in § 455(a). The *per curiam* reported that none of the previous disqualifications were withdrawn in response to that suggestion. Pet. App. A at 3a, n.2.

United States v. Will, 449 U.S. 200 (1980), held that the Rule of Necessity applies in federal courts when disqualifications otherwise would make judicial action impossible. *See Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

Alternatively, the acting chief judge of the Fifth Circuit should either (i) specially designate senior circuit judges under 28 U.S.C. § 294(c) to consider the en banc suggestion,[13] or (ii) certify to the Chief Justice of the United States under 28 U.S.C. § 291(a) the necessity of assigning judges from outside the circuit. Although such measures may not be ideal, they would provide Nixon with a fair opportunity for meaningful appellate review. *Cf. United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (due to recusals by Supreme Court Justices, case assigned to special appellate panel).

The problems raised here by Rule 35.6 are not unique. The Fifth Circuit has struggled with the same issue in cases involving the oil and gas industry, *see Hall v. FERC*, 700 F.2d 218 (5th Cir.), *cert. denied sub nom. Arkla v. Hall*, 464 U.S. 822 (1983), and other courts have faced similar problems. *See In re Ahlers*, 794 F.2d 388 (8th Cir. 1986), *cert. granted sub nom. Norwest Bank Worthington v. Ahlers*, 107 S.Ct. 3227 (1987) (on other issue); *Arnold, supra*; *Zahn, supra*. Because this is a criminal case, however, the procedural issue is even more compelling. This Court has a duty to ensure that a defendant is not—through the happenstance of judicial disqualifications—denied meaningful review of an en banc suggestion.

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[13] In *Moody v. Albemarle Paper Co.*, 417 U.S. 622 (per curiam), this Court ruled that senior judges who sat on a panel hearing could not vote in the en banc poll. Contrary to the suggestion of the court below, Pet. App. A at 5a-6a, that holding does not address our proposal that senior judges be specifically designated under § 294(c)—with the broad powers available under § 296—to consider an en banc suggestion which has triggered numerous disqualifications.

CONCLUSION

For all of these reasons, the writ of certiorari should issue in this case to permit review by this Court of the questions presented in this Petition.

Respectfully submitted,

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Dated: October 21, 1987

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4248

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WALTER L. NIXON, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING and
SUGGESTION FOR REHEARING EN BANC

(Opinion April 30, 1987, 5 Cir., 1987, 816 F.2d 1022)

(September 8, 1987)

Before VAN GRAAFEILAND*, GARWOOD, and JONES, Circuit Judges.

PER CURIAM:

The petition for rehearing is DENIED, and no member of this panel nor judge in regular active service on

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* Circuit Judge of the Second Circuit, sitting by designation.

the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

* * * *

This opinion is entered by the panel in response to appellant's "Memorandum Concerning En Banc Procedures" filed herein in connection with, but separate from and subsequent to, appellant's suggestion for rehearing en banc. Appellant's referenced memorandum addresses itself to the circumstance that eleven of the fourteen judges in regular active service on this Court have recused themselves from consideration of appellant's suggestion for rehearing en banc.[1] Appellant's memorandum makes several suggestions in this regard, summarized as follows:

> 1. That this Court modify its Rule 35.6, which provides that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service on this Court—including any who may be recused in the particular case—vote that the case be heard or reheard en banc. Appellant urges in this connection that, contrary to the explicit provisions of the first paragraph of our Rule 35.6, rehearing en banc should be granted if a majority of the *non*recused judges in regular active service on the Court vote in favor of rehearing en banc.
>
> 2. In addition, appellant's memorandum also proposes that in any event the number of judges considering appellant's suggestion for rehearing en banc be enlarged "preferably [to] at least seven judges" by one of the following alternatives: (a) appellant's

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[1] The recused judges are Chief Judge Clark and Judges Rubin, Reavley, Politz, Randall, Johnson, Williams, Jolly, Higginbotham, Davis, and Hill. Chief Judge Clark has recused himself both administratively and judicially.

waiver of all recusals[2]; (b) designation by the Chief Judge of this Court under 28 U.S.C. § 294(c) of senior judges of this Court to participate in reviewing the en banc suggestion; (c) presentation by the Chief Judge of this Court to the Chief Justice of the United States of a certificate of necessity under 28 U.S.C. § 291(a) requesting the assignment of judges from other courts to review the en banc suggestion.[3]

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[2] Appellant's memorandum states he "is willing to waive all such disqualifications, and invites the government to do the same." The Government, in its response to this portion of appellant's memorandum, states in relevant part as follows:

> "The Government did not seek these recusals and we do not waive them at this time. The Government naturally assumes that each judge who recused himself did so with good cause and with full understanding of the effect of the recusal on the en banc process. It does not believe it appropriate to urge recused judges to reconsider decisions that doubtless were not lightly made. Should the Court or individual judges be inclined to reconsider the recusal decisions, the Government would review each judge's disclosure made pursuant to 28 U.S.C. § 445(e) prior to deciding whether or not it believes waiver to be appropriate."

None of the recused judges of this Court has withdrawn his or her recusal. Consequently, we do not further consider such suggestion.

We further observe that the Government, in its referenced response, opposes each of the other suggestions made in appellant's memorandum.

[3] Since Chief Judge Clark has recused himself in this matter administratively as well as judicially, Judge Gee, who is not recused herein and who is the next senior judge of the Court in regular active service, performs the duties of chief judge in this respect. 28 U.S.C. § 45(d). In that capacity, Judge Gee has declined to make the requested designation under section 294(c) and has declined to make the requested certificate under section 291(a). Judge Gee further advises of his concurrence in this opinion.

3. That if the foregoing steps are not taken "the Rule of Necessity renders void all of the recusals on the en banc suggestion." [4]

None of the procedures suggested by appellant has been adopted. We further explain as follows:

With respect to our Rule 35.6, it is binding, and was adopted and has continued in force with full knowledge of its implications. *See Hall v. Federal Energy Regulatory Commission*, 700 F.2d 218 (5th Cir. 1983), *cert. denied sub nom. Arkla, Inc. v. Hall*, 464 U.S. 822 (1984). While we recognize that there is a split in the practice of the Circuits in this regard, it appears that the majority follows the same practice that this Court follows. *See Lewis v. University of Pittsburgh*, 725 F.2d 910, 928-30 (3d Cir.) (statement sur petition for rehearing of Adams, J.), *cert. denied*, 105 S.Ct. 266 (1984); *United States v. Claiborne*, 765 F.2d 784 (9th Cir. 1985), 781 F.2d 1325, 1327, 1334 (9th Cir. 1985, 1986) (dissenting opinions on denial of rehearing en banc), *cert. denied*, 106 S.Ct. 1636 (1986); *United States v. Claiborne*, 790 F.2d 1355, 1356 (9th Cir. 1986); *In re Ahlers*, 794 F.2d 388, 414-16 (8th Cir. 1986), *cert. granted sub nom. Northwest Bank Worthington v. Ahlers*, 107 S.Ct. 3227 (1978) (grant of *certiorari* "limited to Question 1 presented by the petition"; we understand that this question in no way relates to en banc procedures). Further, our rule plainly seems to be sustained by *Shenker v. Baltimore & Ohio R. R. Co.*, 83 S.Ct. 1667, 1670 (1963). Moreover, even if appellant's position were to be adopted, so that rehearing en banc could be granted by the affirmative vote of a majority of nonrecused judges in regular active service, this would avail appellant nothing for no en banc poll has been requested, and even if there were a poll none of the non-

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[4] However, as previously observed, none of the recusals has been withdrawn, and none of the recused judges has participated.

recused judges of this Court in regular active service would in any event vote to grant rehearing en banc in this case.

With respect to the suggestions for designation of senior Circuit judges to participate in reviewing the en banc suggestion pursuant to section 294(c), or for a certificate of necessity under section 291(a) to the Chief Justice of the United States for the assignment of judges from other courts to review the en banc suggestion, we observe that under the wording of 28 U.S.C. § 46(c) and the Supreme Court's holding in *Moody v. Albermarle Paper Co.*, 94 S.Ct. 2513 (1974), only judges of the Circuit who are in regular active service may make the determination to rehear a case en banc. While *Moody* did not expressly refer to either section 291(a) or section 294(c), nevertheless the Supreme Court was doubtless aware of those sections, but made no suggestion that they might be exceptions to the clear provisions of section 46(c). Further, in *United States v. American-Foreign S. S. Corp.*, 80 S.Ct. 1336 (1960), the Court, in its holding that senior judges could not participate in the decision of an en banc court, made specific reference to section 294, plainly indicating that it did not regard that section as being applicable to en banc proceedings. *Id.* at 1338. Section 46(c) was amended following the decision in *American-Foreign S. S. Corp.*, and now authorizes a senior judge of the Circuit to participate as a member of an en banc court reviewing the decision of a panel of which such judge was a member, such participation in the en banc court to be at the judge's "election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit." However, no senior judge of this Circuit participated in the panel decision in this case. Moreover, the above-quoted portion of section 46(c) indicates that Congress considered the potential applicability of section 294(c) to the service of senior judges in connection with

an en banc process, and limited section 294(c)'s applicability in that respect to decisions of the en banc court reviewing panel decisions in which the senior judge of the Circuit participated. In sum, section 46(c), which specifically speaks to the question, must control over the general provisions of sections 294(c) and 291(a).

We also observe that since an en banc court consisting of only three judges of the Circuit in regular active service has been held permissible, *United States v. Martorano*, 620 F.2d 912 (1st Cir.), *cert. denied*, 101 S.Ct. 356 (1980), and since there are three nonrecused judges in regular active service on this Court, there is no occasion for "a certificate of necessity" under section 291(a). The same conclusion likewise follows from the fact that none of the nonrecused judges in regular active service on this Court deems this case appropriate for en banc consideration, irrespective of the constraints of Local Rule 35.6. And this same reasoning also leads to the conclusion that the "Rule of Necessity" is inapplicable.

Appellant's memorandum takes the position that if the procedures therein suggested are not followed, appellant will be denied equal protection of the laws and due process of the law. We disagree. In *Moody*, the Supreme Court reaffirmed the holding in the *Western Pacific Railroad* case, 73 S.Ct. 656 (1953), which it characterized as construing section 46(c) to be "a grant of power to the courts of appeals to order hearings or rehearings in banc, not the creation of a right in litigants to compel such hearings or rehearings or even to compel the court to vote on the question of hearing or rehearing." *Moody*, 94 S.Ct. at 2515. *See also Shenker*, 83 S.Ct. at 1670. Indeed, the *Western Pacific Railroad* case recognizes that the full court "may choose to abide by the decision by entrusting the initiation of a hearing or rehearing *en banc* to the three judges" of the panel. 73 S.Ct. at 662 (emphasis in original). That opinion likewise states: "We hold that litigants are given no *statu-*

tory right to compel each member of the court to give formal consideration to an application for a rehearing *en banc*. We hold that the statute does not compel the court to adopt any particular procedure governing the exercise of the power . . . ." *Id.* at 666 (emphasis in original). The Court in the *Western Pacific Railroad* case then went on to observe that "whatever the procedure which is adopted, it should not prevent a litigant from suggesting to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing *en banc*, that his case is an appropriate one for the exercise of the power." *Id.* (emphasis in original). Our procedure in Rule 35.6 comports with these standards. And, even if that procedure were as appellant claims it should be, it would not avail appellant because none of the nonrecused judges in regular active service deems the case appropriate for rehearing en banc in any event.

We observe in this connection that none of the judges of the panel deciding this case did so under the constraint of being required to follow a prior decision of this Court with which they disagreed but were nevertheless obligated to adhere to under the rule of this Court that only the en banc court can overrule prior panel decisions (unless such decisions have been invalidated by intervening decisions of the Supreme Court).

Finally, under the practice of this Court en banc consideration is limited to cases involving " 'a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court [or] Fifth Circuit precedent.' " *Gonzalez v. Southern Pacific Transp. Co.*, 773 F.2d 637, 641 (5th Cir. 1985) (quoting Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit accompanying Local Rule 35). This case does not fall within either category. The panel opinion is not in direct conflict with any prior Supreme Court or Fifth Circuit precedent.

Although appellant characterizes his contentions otherwise, we believe that in substance they actually amount only to a claim that the panel has made a " 'misapplication of correct precedent to the facts of the case.' " *Gonzales*, 773 F.2d at 641.[5] Similarly, the panel opinion does not involve "a precedent-setting error of exceptional public importance." As indicated, even if the panel erred (and it continues unanimously in the view that it did not), the error would at most amount to one of misapplication of precedent to the facts at hand, rather than establishing a new precedent of exceptional public importance. We recognize that the decision in this case, as opposed to the rules of law applied in the panel opinion, is of public importance because of the position of appellant, but we do not consider that appellant's position alone suffices to make the case appropriate for en banc consideration. *Cf. United States v. Claiborne*, 765 F.2d 784 (9th Cir. 1985), 781 F.2d 1325, 1327, 1334 (9th Cir. 1985, 1986) (dissenting opinions on denial of rehearing en banc), *cert. denied*, 106 S.Ct. 1636 (1986); *United States v. Claiborne*, 790 F.2d 1355, 1356 (9th Cir. 1986); *United States v. Isaacs*, 493 F.2d 1124, 1167-69 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). Accordingly, we do not deem the case an appropriate one for en banc consideration.

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[5] The panel continues unanimously in the view that no misapplication has been made.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 86-4248

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

WALTER L. NIXON, JR.,
Defendant-Appellant.

April 30, 1987

Before VAN GRAAFEILAND,* GARWOOD, and JONES, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

Walter L. Nixon, Jr. (hereinafter "appellant") appeals from a judgment of the United States District Court for the Southern District of Mississippi, convicting him of perjury before a grand jury. 18 U.S.C. § 1623. We affirm.

Although appellant's trial was a lengthy one, the events leading to his grand jury testimony may be fairly briefly summarized. Appellant had been a judge of the very court in which he was convicted since 1968, and Chief

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* Circuit Judge of the Second Circuit, sitting by designation.

Judge of that court since 1982. A married man with three children, he had for some years prior to the incidents at issue herein been dissatisfied with his modest judicial salary, and had looked for means of augmenting it. In 1980, he found these means in the person of Wiley Fairchild, a successful investor in oil and gas properties. Through the intercession of Carroll Ingram, Fairchild's attorney, apepllant was able to purchase an interest in three oil well properties at an extremely modest price. By the time appellant's case went to trial in 1986, appellant had recouped his investment some six times over.

Fairchild, the source of appellant's good fortune, had a son, Reddit Andrew Fairchild, more generally known as "Drew". With a partner named Bob Royals, Drew operated a business at the Hattiesburg Municipal Airport, in which, among other things, they serviced airplanes. In August 1980, Drew and Royals conspired with several others to pick up a load of marijuana in Colombia and fly it to the United States. Drew's and Royals' role was to provide confidential access to the airport and to refuel the plane. *See United States v. Royals*, 777 F.2d 1089 (5th Cir. 1985). The conspiracy was brought to an abrupt halt by law enforcement officials who met the plane at the airport.

Despite Drew's admitted participation in the conspiracy, he was not indicted by a federal grand jury until March 29, 1985. The events which intervened were somewhat bizarre. Although Drew was not arrested at the scene of the crime, he was concerned that eventually he would be. Three of Drew's coconspirators were indicted by a federal grand jury on August 19, 1980, and, shortly thereafter, Drew sought legal help. He and attorney William Porter went to Forrest County District Attorney Paul ("Bud") Holmes to discuss Drew's situation, and Holmes sent them to United States Attorney George Phillips, who was overseeing the prosecution of

the indicted conspirators. The end result of their meeting with Phillips was a "Memorandum of Understanding," executed on November 19, 1980, in which Drew agreed to plead guilty and to cooperate with the Government, in exchange for which the Government would recommend a five-year sentence with execution suspended and a $15,000 fine.

Porter then requested $10,000 in payment for his services. Upon Drew's refusal to pay, Porter commenced suit against him in March 1981. When Drew was questioned by his father, he told his father that he thought Porter had spent about twenty-five hours on his case. Unknown to Drew, his father then sent Porter a check for $2,669.19 on July 3, 1981. Porter insisted, however, that he was entitled to the full amount of his bill, and he complained to his friend Holmes about his inability to collect it. Concluding that an indictment of Drew would help bring about payment of the balance of Porter's fee, Holmes, after clearing the matter with United States Attorney Phillips, presented the case against Drew and a heretofore unindicted coconspirator, Robert Watkins, to a State grand jury. On August 26, 1981 the grand jury returned an indictment against both Drew and Watkins. On September 3, 1981, the day on which Drew was arraigned, his father gave Porter a check for $7,500.

Thereafter, Drew agreed to testify against Watkins in return for assurances from Holmes that he would receive five years probation and a $5,000 fine. On January 12, 1982 he pled guilty, and sentencing was scheduled for March 19, 1982. Because Drew was recovering from back surgery in March, his sentencing was continued to the July 1982 term. Thereafter, it was continued to the August term, to the November term, and then indefinitely. On December 23, 1982 Holmes moved successfully to have Drew's case "passed to the file," a procedure

which places cases in an inactive status and generally results in their termination.

In Drew's case, however, the media, in his words, "made a big issue of it", and his case remained "in the file" for only three weeks. When Holmes was asked why this was so, he testified in part:

> Well, because I had made the statement once Watkins [who had been a fugitive] got back I was going to open it up. That and the fact it was an awful lot of publicity on it, the television, newspapers had picked it up, they were talking about the fact this very wealthy, son of a very, very wealthy man in Hattiesburg, like his case had been swept under the rug, they were editorializing about it. I made the public statement that when we got Watkins got back up here I was going to bring it back out of the file if we could get him.

Although the reinstated case was assigned to a different judge, Drew still was not called for sentencing. His case was continued through 1983 and 1984 and into March 1985, when the Forrest County Circuit Judge to whom the case had been reassigned announced that he would not honor Drew's plea agreement. Drew then was indicted in federal court, and, after pleading guilty, was sentenced to six months in prison.

When the FBI was informed of appellant's oil deal with Fairchild, it suspected that there might be an illicit relationship between it and the somewhat unusual treatment of Fairchild's son. It began an investigation which culminated in the presentation of evidence to a federal grand jury. Appellant voluntarily appeared and testified. The grand jury returned an indictment charging appellant with one count of bribery and three counts of perjury. He was acquitted on the bribery count and the first perjury count but was convicted on the remaining two counts of perjury.

The first count on which appellant was convicted was based on the following allegedly false testimony before the grand jury:

> Q. The grand jury has heard evidence that the prosecutor, the state prosecutor, who eventually handled the case was an individual named Bud Holmes. Is he a friend of yours?
>
> A. Very good friend of mine, long time friend, yes.
>
> Q. Did he ever discuss the Drew Fairchild case with you?
>
> A. No, not to the best of my recollection. I think I would recall if he had.

The second such count was based on the following testimony:

> All right. Judge, do you have anything you want to add?
>
> THE WITNESS:
>
> Yes, I do.
>
> I want to say this. I—Here (indicating) are your notes too, copies of your instruments, rather.
>
> I came here voluntarily and am very happy to cooperate with this grand jury and give them all the information that I have and that I could. And I have always thought everyone should do that, and that goes for the grand jury over which I'm supervising right now, the other federal grand jury that's sitting at this time. I have nothing at all to—had nothing to hide or nothing to withhold and I brought everything that you asked me to bring.
>
> And I want to say this. That I've been told and led to believe and read in the newspaper and heard on the news media so much about this is an investigation of the Drew Fairchild criminal case. Now,

I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court. I don't need to reconstruct anything with reference to that. I've told you that from the beginning.

I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where—someone told me maybe Judge Russell handled one of the other defendants also and—but I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way influence anybody with respect to this case. Didn't know anything about it until I read that account in the newspaper. Didn't even know Mr. Fairchild had a son when I was dealing with him in the business transaction.

So I want to say that because I understand that's what this is all about. The investigation is apparently, if the news media is correct, and if I understand it correctly, that's what this is about, the Drew Fairchild criminal case.

Some of the testimony offered by the Government in support of its claim that the foregoing testimony was false is substantially undisputed. It is undisputed that on one occasion, the exact date being unclear, appellant visited Wiley Fairchild in Fairchild's office. Fairchild testified that he sought out appellant because appellant was a good friend of Holmes and Fairchild "wanted [appellant] to get Bud Holmes to do what he had promised to do." In response to questions by his own attorney, appellant summarized this portion of his conversation with Fairchild as follows:

Q. Did he ask you to do anything?

A. No.

Q. Did he discuss or you discuss with him in any way the case of Drew Fairchild?

A. No, I did not.

Q. Did you get the impression from him that he wanted you to say anything to anyone about it?

A. I got the impression that he wanted me to mention something about that to Bud Holmes.

Q. Did he make any request of you to do so?

A. No, he didn't.

It is undisputed that, following this conversation, appellant went to Holmes' farm. Holmes testified that he and appellant went there in Holmes' car; appellant said that he drove his own car. Holmes tesitfied further that, en route to the farm, the following conversation took place:

We was riding up to pick up the turkeys, this would have to be 6, 6:30, 7 o'clock, riding out, and Judge Nixon told me, he said, Bud, I never would have asked you to do anything against your oath of office, never asked you to do anything embarrassing to you, wouldn't ask you to do anything wrong. I said, yes, sir. He said, I was out at Mr. Fairchild's and he asked me to put in a good word for his boy, or would I say something to you about Drew. —I think, I don't think he said Drew, I think he said his boy. I said, you know, well, I don't know. I don't know. What is it you want? You want an apology? I don't know. What does the man want?

Q. Are you saying did you say that to Judge Nixon?

A. Yeah, that was about my response. I can't remember this, because as I recall this was like in May of 82, you know, when this occurred. But that

was about my response, I mean, I was feeling rich and good-looking and, you know, that would have been my typical type answer.

He said I'm not asking you to do anything, I'm just saying that Mr. Fairchild asked me to put in a good word. Well, I knew Mr. Fairchild and the judge were kind of getting to be buddy-buddies there.

Q. How did you know that?

A. Pardon?

Q. How did you know that?

A. He had told me, or Carroll Ingram had told me that they were or he told me, could a come from Mr. Fairchild.

Q. Did he tell you why he'd called Mr. Fairchild?

A. He could have. I don't recall off hand, it seemed like he might have told, somewhere during the conversation I knew there was a chance he was going to make some more oil and gas investments with him. Seemed like he said maybe Mr. Fairchild said they were going to take a trip somewhere, you know, now what point in time, I don't remember but all this was, at that time it was nothing real important to me to really remember, so, don't hold me and say it occurred on that time but general impression I had was they got to be on a first man type basis and friendly. So, I took it on myself, said, well, judge, hell, I'm district attroney, I'll pass it to the files. And he said no, I'm not asking you to do that. Now, I'm not asking you to do anything now.

Holmes also testified concerning what transpired after he and appellant reached the farm:

Well, okay. We rode on out to the farm, got the turkey, went inside. I asked him to come in, have a drink.

Q. Whose house did you go to?

A. Go to mine, which was out in the Barrington community. We went inside. He said that he'd come in and have a drink, if I had some Royal Salute, that's kind of a joke between us, very expensive scotch whiskey, somebody gave it to me for Christmas a year earlier and I said I did. He came in, we had a drink, probably had a couple of drinks, and I had told him that I had already had this arrangement worked out with Bill Porter, the man had the same agreement that the federal court had offered, which was probation and a fine, in return for his cooperation. He said do you mind if I call and tell Wiley? Or he could have said, Wiley, Mr. Fairchild. He said did he know? I don't know. I assume he did. Carroll Ingram sure knew it. And so he said do you mind if I tell him? I said no, I don't care.

So he called him and as I recall the conversation it's something like—

Q. Who made the telephone call?

A. Pardon?

Q. Who made the telephone call?

A. He did. And he told him, he said, I'm out at, said do you remember the man we were talking about today? I'm out at his farm and he tells me that your son isn't going to jail, which was true, you know, because of the plea arrangement and I just wanted to call and tell you that. And he thanked him, told him I appreciate you letting me make some of these investments, you know, with you, and he said, you know, the judge's salary and the number of children that I'm trying to educate and so forth, it was kind of hard and I do appreciate this opportunity.

And, with that, I told him, I said let me speak to him. And I picked the phone up and I said, Mr.

Fairchild, I want to let you know, I hope you don't think there's anything personal about Drew and us and he said no, I never thought that. I'm real embarrassed about that and so forth and I take full blame here because Julge Nixon did not ask me to say or do this, but I told him, I said, I said I want to let you know that I want Judge Nixon to have credit for helping the boy. Of course I was misleading him because I already had the arrangement worked out with Bill Porter.

And I told him, I said I'm going to pass the case to the files. You know, I told Mr. Fairchild that. And that was, you know, basically the sum and substance of it.

Appellant's testimony corroborated that of Holmes in part and contradicted it in part:

Q. Tell us what happens.

A. Well, we were talking and this thing was just weighing on my mind what Mr. Fairchild had accused him of.

Q. Tell us what you said, what he said.

A. I said Bud, I've been talking to Wiley Fairchild. And I said he is accusing you of blackmailing him. He said—I said with reference to this matter some matter with his son. And—

Q. Did you mention him—now listen to my question. You mentioned the blackmail. Did you mention to him at all how you understood he was being blackmailed?

A. Yes, what I understood by blackmail, Mr. Fairchild indicated to me talking about dragging the good Fairchild name through the mud in the news media.

Q. When you told that to Bud, what did he say? Tell us exactly what you remember him saying?

A. He said the son of a bitch is paranoid. He said everybody is after his money, he's got so much he'll never be able to spend it, he's crazy.

Q. What else did he say?

A. He said let me tell you about the case.

Q. What did you say?

A. Bud, I don't want to hear about the case.

Q. Let me stop you a second. Was there anything wrong in your hearing about the case?

A. No, I'd have been there all night because it takes Bud an hour to tell you what anybody else could tell you in a minute.

Q. Did you have any interest in hearing about the case?

A. No.

Q. When you told him that you didn't want to hear about the case, what did he say?

A. He said well, the thing's all worked out anyway. He said, I don't understand what he's talking about.

Q. Did he tell you anything else?

A. I don't recall that he did.

Q. Was there any—he told you when he said to you the thing's worked out, he doesn't know what he's talking about?

A. Yes.

Q. Did you say anything more than that to him?

A. No.

* * * *

Q. Coming back all seriousness while you're there listening to records having a drink and looking at the records, while he's making these calls, tell us what else occurs?

A. In a few minutes he said, called me over, judge come here a minute. He called me judge and I called him Bud. He handed me the telephone. He said here, talk to Wiley Fairchild.

Q. Go ahead.

A. So I took the phone and I told him hello and he said how are you judge, and I don't know whether Mr. Fairchild was half asleep or half drunk or what but he didn't sound just right. And he said I'm glad you mentioned that matter to Bud. He said I'm satisfied.

Q. Anything else?

A. No.

Q. What did you do with the phone?

A. I handed it back to Bud. When he handed it to me, he told me he wanted to talk to him again when I got off.

Q. Do you have any awareness at that point what Bud had said to Wiley before he handed you the phone?

A. No.

Q. What was your state of mind or how did you feel about Bud having made that call to Wiley?

A. Well, I was taken aback. I didn't know he was going to call Wiley Fairchild.

Q. Did Bud then speak to him for another minute or two?

A. I guess so. I handed him the phone and walked back over by the records. I was disgusted.

Q. Did you say anything to Bud after he got off the phone?

A. Yeah, I said Bud, why did you call Wiley and what did you say to him. He said I just wanted to get the damn thing straightened out.

Q. That's it?

A. That's all.

Unfortunately, for appellant, Holmes' testimony concerning the telephone call to Fairchild was corroborated by Fairchild himself:

Q. Okay. Did you have subsequent contact with Judge Nixon about your meeting?

A. He called me that night just about seven o'clock.

Q. What did he say?

A. He said Wiley, you know that man we was talking to this evening? I said yeah. He said well, I'm in his home, and everything going to be taken care of to your satisfaction. I says thank you, I appreciate that.

Q. Did you recognize the voice at the other end?

A. Yeah.

Q. Did he identify himself?

A. No.

Q. How did you recognize his voice?

A. I just can recognize voices.

Q. What followed that conversation with Judge Nixon?

A. Bud got on the phone, Bud Holmes.

Q. And did you recognize his voice?

A. Oh, yeah. Yeah.

Q. What did he say to you?

A. He said Wiley, when this man asks me to do something, I don't ask no questions, I just go ahead and do it.

Q. What did you say?

A. I said thank you, Bud, I appreciate that.

Q. Was there any further conversation?

A. No.

Q. What's the next thing that you recall happening in your son's case?

A. Well, it was later passed to the file.

Holmes' testimony also was substantially corroborated by Carroll Ingram:

Q. . . . [Wiley Fairchild] mentioned to you that he had asked something of Judge Nixon in terms of asked him to speak to Bud Holmes, correct?

A. Yes, he asked to—

Q. I beg your pardon. Go ahead.

A. Yes, he said that he asked Judge Nixon to speak to Bud Holmes.

Q. And that it was about the case?

A. And it was about Drew Fairchild's case.

Q. And that's as far as you went. You know nothing more than from Wiley Fairchild about it, correct?

A. I know that Wiley Fairchild told me that Judge Nixon confirmed that he had spoken to Bud Holmes about the case.

Q. Excuse me. Judge Nixon confirmed that to you yourself?

A. Certainly he did.

* * * *

Q. In fact, Judge Nixon had volunteered to you that on one occasion he had in fact, at Wiley Fairchild's request, spoke about Drew Fairchild to Bud Holmes?

A. He certainly had, absolutely.

To obtain a perjury conviction, the Government must prove that the defendant's statements were material, that they were false, and that, at the time they were made, the defendant did not believe them to be true. *United States v. Fulbright*, 804 F.2d 847, 851 (5th Cir. 1986). The materiality of appellant's challenged grand jury testimony was a question of law for the trial judge. *United States v. Thompson*, 637 F.2d 267, 268-69 (5th Cir. 1981). Appellant does not challenge the correctness of the district judge's holding that the subject matter of appellant's testimony was material to the grand jury's investigation.

The evidence on the remaining issues must, of course, be viewed in a light that is most favorable to the Government, with all reasonable inferences and credibility choices made in support of the jury's verdict. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Lamp*, 779 F.2d 1088, 1092 (5th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986). The standard is the same whether the evidence is direct or circumstantial. *Glasser*, *supra*, 315 U.S. at 80, 62 S.Ct. at 469; *United States v. Escobar*, 674 F.2d 469, 477 (5th Cir. 1982). We did not see or hear the witnesses testify; the jury did. After viewing the cold and impersonal record in the light most favorable to the Government, we must affirm if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*

v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *see United States v. Shaw*, 701 F.2d 367, 392 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984). This is so because a jury may choose its verdict among reasonable constructions of the evidence so long as the evidence establishes guilt beyond a reasonable doubt. *United States v. Thomas*, 768 F.2d 611, 614 (5th Cir. 1985) (*quoting United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983)). Viewing the evidence in the manner above described, we can reach no other conclusion save that it warranted the jury in finding that appellant's testimony was false.

The jury also could properly find that appellant knew his testimony was false. Such knowledge can be, and usually must be, proved from circumstantial evidence. *See United States v. Caucci*, 635 F.2d 441, 444 (5th Cir.), *cert. denied*, 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed.2d 108 (1981). Holmes testified on behalf of the Government that, during the FBI's investigation, appellant called him and said that he had told the investigators that "he never talked to anyone at anytime about the case." Appellant subsequently made the same statement to Holmes in a face-to-face meeting, and then asked Holmes to find out whether appellant's conversation with Fairchild from the farm had been taped. It had not. A reasonable jury could conclude from these conversations that appellant was planning to hide the true facts from the grand jury and was soliciting Holmes' support. *See United States v. Abrams*, 568 F.2d 411, 419 (5th Cir.), *cert. denied*, 437 U.S. 903, 98 S.Ct. 3098, 57 L.Ed.2d 1133 (1978).

There is no merit in appellant's belated attempt to argue ambiguity. There certainly is no ambiguity in the question, "Did [Holmes] ever discuss the Drew Fairchild case with you?". This was not a question that required

a recollection covering a full lifetime, but necessarily was limited to the period following Drew's indictment and Holmes' retirement from office in 1984. Its clarity was amply demonstrated by appellant's voluntary comments that followed, in which he said that he had read in the newspapers that "this is an investigation of the Drew Fairchild criminal case", and that he "didn't know anything about it until [he] read that account in the newspaper"; that he had "never talked to anyone, state or federal, prosecutor or judge, in any way influence anybody with respect to this case." The record shows that appellant answered the question without hesitancy, evasion, or qualification. *United States v. Caucci, supra,* 635 F.2d at 445. If in the natural meaning in the context in which his words were used they were materially untrue, perjury was established. *United States v. Bonacorsa,* 528 F.2d 1218, 1221 (2d Cir.), *cert. denied,* 426 U.S. 935, 96 S.Ct. 2647, 49 L.Ed.2d 386 (1976).

There was no need for the district court to define the word "discuss" for the jury. "[W]ords that are clear on their face are to be understood in their common sense and usage." *United States v. Fulbright, supra,* 804 F.2d at 851. Appellant's counsel had no hesitancy in using the same word in questioning his client; *e.g.,* "Did he discuss or you discuss with him in any way the case of Drew Fairchild?"; "What if any discussion do [sic] you have with him at that time?".

We also conclude that appellant's reliance on *Bronston v. United States,* 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), is misplaced. In *Bronston,* the Supreme Court held that the federal perjury statute does not reach a literally true but unresponsive answer, even if the witness intended to mislead his qusetioner and even if the answer was arguably false by negative implication. Appellant argues that the prosecutor could not have intended his question to refer to the discussion appellant did have with Holmes, because the prosecutor knew noth-

ing about the discussion until after appellant testified. For this reason, appellant argues, the prosecutor's question was impermissibly vague and imprecise under the rationale of *Bronston*. We find this argument unpersuasive. The purpose of a grand jury inquiry is to discover whether a crime has been committed and, if so, who committed it. *In re Marc Rich & Co., A.G.*, 707 F.2d 663, 665-66 (2d Cir.), *cert. denied*, 463 U.S. 1215, 103 S.Ct. 3555, 77 L.Ed.2d 1400 (1983). *Bronston* does not require that a prosecutor know how a defendant will answer a question before he asks it.

Appellant makes numerous allegations of prosecutorial misconduct, which are not of significant merit, separately or collectively, to require individualized discussion. We see no prejudicial improprieties in the Justice Department's interview of appellant during its preliminary investigation, the tape of which was placed in evidence by the defense. No objection concerning alleged grand jury abuse was made below, and no meritorious objection has been made to this Court. *See United States v. Calandra*, 414 U.S. 338, 343-45, 94 S.Ct. 613, 617-18, 33 L.Ed. 2d 561 (1974); *United States v. Brown*, 574 F.2d 1274, 1275-77 (5th Cir.), *cert. denied*, 439 U.S. 1406, 99 S.Ct. 720, 58 L.Ed.2d 704 (1978). See also *United States v. Mechanik*, —— U.S. ——, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986). There is no merit in appellant's contention that the bribery count was insufficient as a matter of law. "An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). Appellant did not move for severance of the bribery count. Since the proof on all four counts was necessarily intertwined, no prejudicial error resulted from the fact that they were tried together. *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 570, 66 L.Ed.2d 471

(1980); *see United States v. O'Connell*, 703 F.2d 645, 648-59 (1st Cir. 1983).

Appellant grasps at straws in arguing that the prosecutor misstated the evidence he proposed to produce when he opened to the jury and misstated the evidence actually produced when he summed up. In evaluating allegations of such prosecutorial misconduct, the "test . . . is whether the remarks were improper and whether they prejudicially affected substantial rights" of the defendant. *United States v. Dorr*, 636 F.2d 117, 125 (5th Cir. 1981); *see Darden v. Wainwright*, —— U.S. ——, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). We have carefully reviewed the prosecutor's comments in the context of the entire case, including the district court's admonishments to the jury that statements by counsel were not evidence, *see Donnelly v. DeChristoforo*, 416 U.S. 637, 634, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974); *United States v. Cardenas*, 778 F.2d 1127, 1130-31 (5th Cir. 1985), and we are completely satisfied that they pass this test. In view of the complete lack of merit in appellant's argument, we see no need for a more detailed discussion.

Appellant's contention that he was denied due process and a fair trial because all of the requested information in his demand for a bill of particulars was not furnished, is without substance. The purpose of a bill of particulars is to minimize surprise by giving "sufficient notice of a charge for its defense." *United States v. Carlock*, 806 F.2d 535, 550 (5th Cir. 1986). A district court's decision to deny demanded particulars is a discretionary one which will be reversed absent a showing of surprise and substantial prejudice. *Id.* Appellant has made no such showing.

Equally without substance is appellant's claim that he was prejudiced by the district court's "erroneous" refusal to dismiss the bribery charge at the conclusion

of the proof. In response to appellant's motion for acquittal, the prosecutor pointed out that appellant had already made $50,000 profit "with more to come" on a $9,000 investment, and that there was ample evidence that appellant had rendered assistance to his benefactor's son. There was also proof in the case that the documents evidencing appellant's oil property investment had been backdated, so that they antedated the aborted drug conspiracy by approximately six months, and that the name of the grantee was withheld from Fairchild's employee who prepared the deeds of conveyance. Despite this evidence, the jurors rejected the Government's claim of bribery. This does not mean, however, that they should not have been permitted to consider it. In any event, appellant has not shown that the denial of his motion tainted the jury's consideration of the three perjury counts, on one of which appellant was acquitted. *See United States v. Zicree*, 605 F.2d 1381, 1388-89 (5th Cir. 1979), *cert. denied*, 445 U.S. 966, 100 S.Ct. 1656, 64 L.Ed.2d 242 (1980).

Appellant's unspecified and unsubstantiated claims of evidentiary error do not merit discussion. Neither does appellant's claim of error in the court's denial of his motion for a new trial on the ground of "newly discovered evidence." The district court gave careful consideration to the alleged newly discovered evidence, which was addressed to the date of appellant's conversations with Fairchild and Holmes. It held that, to a large extent, the evidence was not credible and that, in any event, it was not probative of meaningful error in the date which Holmes had assigned. We agree.

The judgment of conviction is affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Criminal No. H85-00012(L)

UNITED STATES OF AMERICA

VS.

WALTER L. NIXON, JR.

MEMORANDUM

By Order dated March 31, 1986, the Court denied defendant's Motion for Judgment of Acquittal or, in the alternative, for a New Trial on Counts III and IV of the Indictment. This Memorandum sets forth the Court's reasoning.

Defendant sought a judgment of acquittal or, in the alternative, a new trial for five separate reasons. In addition, during the evidentiary hearing on defendant's motion, defendant raised an additional argument concerning nondisclosure by the government of a document under Rule 16, F.R.Crim.P. Each argument will be addressed separately.

1. *Materiality*

Defendant alleges that the Court erred in finding the responses charged as perjurious in Counts III and IV "material" to the grand jury's investigation. The Court finds no merit in this argument.

The foreman of the grand jury testified as to the areas of inquiry and scope of the grand jury's investigation. It was clear from his testimony that the grand jury was investigating whether defendant's financial relationship with Wiley Fairchild had anything to do with the handling of Drew Fairchild's drug case. Included in the investigation was the relationship between Bud Holmes and defendant and whether that relationship affected handling of Drew Fairchild's case.

The perjurious statements attributed to defendant included his statement that he never discussed Drew Fairchild's case with Bud Holmes (Count III) and his statement that he had "nothing whatsover officially or unofficially to do with the Drew Fairchild criminal case" and never "in any way influenced anybody with respect to this case" (Count IV). It is clear that these statements were "capable of influencing the grand jury's investigation." *United States* v. *Corbin*, 734 F.2d 643, 654 (11th Cir. 1984); *United States* v. *Oberski*, 734 F.2d 1034, 1035 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 797 (1985). The Court rejects defendant's argument that the statements were "factually insignificant"; indeed, these statements go to the heart of what the grand jury was investigating. The Court does not find merit in defendant's other arguments and finds that these statements were material to the investigation.

2. *Sufficiency*

Defendant's next contention is that the evidence adduced at trial was insufficient to support the jury verdict on Counts III and IV. In deciding this issue, the Court must view the evidence in the light most favorable to the government, *United States* v. *Poitier*, 623 F.2d 1017, 1022 (5th Cir. 1980). The Court cannot "'assess the credibility of witnesses, weigh the evidence, or substitute its own judgment as to guilt or innocence for that of the jury." *United States* v. *Brown*, 587 F.2d 187,

190 (5th Cir. 1979). If the Court is convinced, viewing the evidence most favorably to the government, that the jury "could find that the evidence establishes guilt beyond a reasonable doubt," *United States* v. *Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (*en banc*), *aff'd*, 462 U.S. 356 (1983), then the Court must deny the motion.

Both the government and defendant have extensively cited to the trial record in arguing sufficiency of the evidence. The Court sees no reason to discuss at length all the testimony adduced at trial. The Court has carefully reviewed the arguments of both sides and the trial record and finds that there was ample evidence from which a jury could find guilt beyond a reasonable doubt on Counts III and IV. Resolving inconsistencies in testimony and judging credibility are matters for the jury. There was sufficient evidence to support the jury's verdict and the Court will not disturb that verdict.

3. *Taint*

Defendant next argues that the presence of Count I "tainted" the perjury counts and improperly influenced the jury by allowing them to consider "improper" evidence. The Court rejects this argument for two reasons. First, nearly all of the evidence pertaining to Count I would have been admissible on the perjury counts. Second, the jury's verdict of acquittal on Counts I and II shows that the jury was able to consider each count separately and was not improperly influenced by the presence of Count I.

The Court notes that defendant made no motion to sever Count I pursuant to Rule 14, F.R.Crim.P. Defendant now argues that the mere presence of the alleged gratuity count prejudiced defendant on the perjury counts. The Court need not decide whether defendant waived this argument by not requesting a severance, *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir.

1981), because the Court believes joinder of those counts was proper.

Joinder is proper when the evidence on one count would be admissible in a trial on the other counts, *United States* v. *Hamilton*, 694 F.2d 398, 401 (5th Cir. 1982); *United States* v. *Scott*, 659 F.2d 585, 589 (5th Cir. 1981), *cert. denied*, 459 U.S. 854 (1982), or when there is a "substantial identity" among the facts and participants in the different counts, *United States* v. *Long*, 674 F.2d 848, 854 (11th Cir. 1982). Here, the evidence of the business relationship between defendant and Wiley Fairchild, defendant's involvement in the handling of Drew Fairchild's case, and defendant's discussions relating to Drew Fairchild's case were admissible as to Count I *and* the perjury counts. Such evidence would be admissible in a trial on the perjury counts alone as background evidence and as evidence of motive and intent.

It is also clear that the jury considered each count separately. Defendant was acquitted on Count II (perjury) which undermines defendant's argument that the jury was predisposed to convict defendant on the perjury counts by the mere inclusion of Count I. Worth noting too is that defendant was *acquitted* of Count I. This is not a case where the jury convicted the defendant of the count complained of and then became predisposed to convict on the remaining counts.

The Court is convinced that the jury carefully considered each count separately which, of course, they were instructed to do. The jury deliberated over a two-day period and sent various notes to the Court during that time which also lead the Court to believe that they carefully sifted through all the evidence with respect to each count.[1] The Court finds no merit in defendant's "taint" argument.

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[1] All notes received from the jury and subsequent in-chambers discussions are, of course, part of the record.

4. *Juror Bias*

Defendant next contends that certain jurors were biased against defendant. This argument has two prongs. The first alleges that three jurors were biased against defendant but did not reveal their biases when examined during voir dire. The second alleges that four jurors read newspaper articles and watched television news stories about the trial prior to sequestration despite the Court's instructions.

With respect to the first allegation, defendant relies on the Affidavit and testimony of Linda Gallagher who was on the jury panel but did not sit as a juror or alternate at trial. Ms. Gallagher alleged that jurors Bernadette Clifton, Lillie Mize and Peggy Crawford all made remarks to her indicating their prejudices against defendant.[2] Because of defendant's motion and the Affidavit of Linda Gallagher filed therewith, the Court held an evidentiary hearing in which Linda Gallagher and all three jurors in question testified. All three jurors vehemently denied making the statements attributed to them by Linda Gallagher. All three jurors denied making any similar statements and further stated that they had not even heard anybody else make any similar statements.

Jury selection in this case took nearly five days. The Court allowed extensive questioning of individual jurors because of pretrial publicity and to insure a fair and impartial jury. These three jurors were each questioned individually by attorneys for both sides. Each of these jurors affirmed at that time that she could be impartial and fair to both the government and defendant. Each reiterated that impartiality during the evidentiary hearing.

The Court finds the testimony of these three jurors credible but does not find the testimony of Linda Gallagher credible. Gallagher's testimony is suspect for a number of reasons. She either intentionally lied or was

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[2] *See* Affidavit of Linda Gallagher dated March 4, 1986 submitted with defendant's Motion for New Trial.

careless in her Affidavit and the questionnaire she completed. She admitted that the words "about the trial" should have been deleted from her Affidavit when she stated that fellow jurors read newspaper articles and watched television news stories despite the Court's instructions. Her questionnaire was misleading insofar as she denied having been arrested, having been the victim of a crime and having knowledge of her husband's prior record. There was also testimony that she spent much of the time during the jury selection process drinking beer and "partying" which indicate she may not have taken the process seriously. She also has a history of mental health problems which include two attempted suicides. The jurors who testified also stated that Gallagher was shunned by others on the panel because of her loud and abrasive demeanor.

Gallagher also stated that she tried to see counsel for defendant with her concerns but was turned away by a marshall on the Saturday the jury was selected. All of the marshalls who were on duty that day testified. They were all familiar with Gallagher and characterized her as "loud" and the type who sought attention. None of them recalled being approached by Gallagher with a request to see counsel or the Court.[3] For all of these reasons, the Court discredits Gallagher's testimony with respect to the alleged biases of jurors Clifton, Mize and Crawford. The Court found the three jurors to be sincere and credible witnesses.

The other allegation raised by Gallagher's Affidavit is that of jurors watching television news or reading news coverage of the trial during the week of jury selection. Gallagher admitted during the evidentiary hearing that she really did not know whether anyone had actually been

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[3] The Court also notes that counsel for both sides and the Court were readily available during the five days of jury selection. At no time during this period did Gallagher attempt to raise any concerns with counsel or the Court.

exposed to coverage "about the trial" and that her Affidavit was in error on that point. Nevertheless, the Court allowed jurors Clifton, Mize, Crawford and John Wesley Davis to be questioned on this point.

Jurors Clifton and Mize denied watching any television news or hearing any news on the radio. They further denied reading anything about the trial during the week of jury selection. The Court has no reason to disbelieve these jurors and finds their testimony credible.

Juror Peggy Crawford admitted she watched television in the evening during the week of jury selection and did not turn the news off at 10:00 p.m. She recalled seeing the news, including coverage of the trial, on Wednesday, Thursday and Friday nights. She said she only remembers news accounts on how many jurors had been selected and that the news did not influence her in any way.

Juror John Wesley Davis testified that he did not watch any "news" during the jury selection week but had seen at least one "newsbreak" which reported how many jurors had been selected. He also stated that he listened to his car radio while commuting home but did not recall hearing any news of the trial.

The Court first notes that the jury in this case was sequestered preceding opening statements through final deliberations. So too did the Court allow extensive individual examination during voir dire by attorneys for both sides. The limited contact jurors Crawford and Davis had with media coverage during the week of jury selection does not warrant a new trial. There was certainly no news account of any testimony or argument of counsel because the jury was sequestered prior to the actual start of trial.

Before this Court will grant defendant a new trial on the basis of adverse publicity, defendant must "demonstrate an actual, identifiable prejudice attributable to that publicity on the part of members of his jury." *Mayola* v. *State of Alabama*, 623 F.2d 992, 996 (5th Cir. 1980),

cert. denied, 451 U.S. 913 (1981). Defendant has only shown (1) that Peggy Crawford watched three television newscasts that were accounts of how the jury selection process was progressing, and (2) that John Wesley Davis *may* have heard radio news accounts and did see at least one "newsbreak" regarding the selection process. Defendant has not pointed to *anything* negative or adverse in these news accounts. Nor has he shown that the news accounts in any way affected the impartiality of these jurors.

Defendant is entitled to "a panel of impartial, 'indifferent' jurors" who decide the case based on the evidence adduced at trial. *Mayola* v. *State of Alabama*, *supra*, 623 F.2d at 998. The constitutional standards of fairness, however, do "not require jurors to be wholly ignorant of the case." *Id.* Defendant has failed to show that he was in any way prejudiced by the very limited contact these jurors had with news accounts of the trial. Accordingly, the Court finds defendant's argument to be without merit.

5. *Perjured Testimony*

Defendant next contends that he is entitled to a new trial because Bud Holmes' testimony was perjured. In order to obtain a new trial based on a perjury allegation, defendant must show the following:

(1) the statements actually were false;

(2) the statements were material, i.e., "a highly significant factor reasonably likely to have affected the judgment of the jury"; and

(3) the prosecution knew they were false.

United States v. *Mack*, 695 F.2d 820, 822-23 (5th Cir. 1983). *See also United States* v. *Chagra*, 735 F.2d 870, 874 (5th Cir. 1984). For the following reasons, the Court finds defendant's argument without merit.

The Court gave defendant an opportunity during the post-trial evidentiary hearing to demonstrate the alleged perjury. Defendant has failed to show that Holmes' testimony was, in fact, perjurious. During trial, Holmes testified that the "phone call incident" occurred prior to his passing Drew Fairchild's case to the files.[4] Holmes tried to date the phone call in various ways. He testified that he believed the call took place on May 14, 1982—the night before he attended a wedding, the night of a hair-pulling incident between his girlfriend and secretary, and the night defendant came to his farm to pick up some turkeys Holmes was keeping. Holmes emphasized, and stated repeatedly, that it could have been a different day. He stated he was only certain that the call preceded passing Fairchild's case to the files.

Defendant's evidence did not show that the call did not occur prior to Fairchild's case being passed to the files. Defendant's evidence, as best, tended to impeach Holmes' recollection that the call occurred on the night of the hair-pulling incident and on the night defendant was at Holmes' farm to pick up some turkeys. Defendant's evidence fell short even on these two points.

With respect to the hair-pulling incident, Katie Matison testified she first learned of the incident in 1983 and felt it had been a "recent occurrence." She was not a witness to the incident but is convinced it occurred in 1983.[5]

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[4] Records introduced at trial reflect that Fairchild's case was passed to the files in December, 1982.

[5] Defendant has argued that the government chose not to put on their rebuttal witnesses at trial after learning that Katie Matison would contradict them. Counsel for defendant has stated that government counsel were convinced that their rebuttal witnesses were ready to perjure themselves to support Holmes' testimony. The Court has considered all the testimony on this point including that of Assistant United States Attorney Weingarten and rejects defendant's argument. Weingarten has specifically denied

Juxtaposed to Matison's testimony is the stipulation between counsel that six government witnesses would testify that the hair-pulling incident occurred in the spring of 1982. In addition, Meg Cosby testified that she learned of the incident from Prentiss Smith while she worked for Smith prior to her leaving to move to Alabama in July, 1982. She also recalled discussing the matter with one of the participants prior to the end of August, 1982.

It is clear that there is conflicting testimony on when the hair-pulling incident occurred. Defendant has failed to prove, however, that Holmes' testimony on this point was false. Defendant has, therefore, failed to establish the first element of falsity with respect to the hair-pulling incident.[6]

Defendant also challenged Holmes' dating of the occasion defendant picked up turkeys at Holmes' farm. Prentiss Smith testified that he recalled a hunting trip to Vicksburg in 1983. Smith introduced invoices which reflected a chartered airplane trip to Vicksburg in 1983. He further testified that he "learned" that defendant had been hunting there and was giving some turkeys to Holmes. Dan McDonald testified that he too was on this

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that he was convinced Katie Matison's testimony was accurate. The Court believes that the decision not to call the rebuttal witnesses was a tactical one and not one based on a belief that the rebuttal witnesses were prepared to commit perjury.

[6] Although the Court need not look to the materiality of the statement because the statement has not been proven false, the Court is not convinced of its materiality. The timing of the hair-pulling incident is one event Holmes used to date the phone call. Holmes emphasized, however, that he could be wrong on the exact dating but was certain the call preceded passing Fairchild's case to the files. Even if defendant conclusively established that the hair-pulling incident occurred in 1983, the Court is not convinced of the materiality of that fact given Holmes' admitted uncertainty of precise dates.

trip in 1983 and also recalled defendant's turkeys being given to Holmes.

The testimony of these individuals is also suspect. Prentiss Smith is the father of Katie Matison. During trial, Matison was interviewed by the prosecution team in the company of her father. Smith was asked at that time about this trip to Vicksburg and could not recall defendant even being present in Vicksburg. At the post-trial hearing, Smith could not recall who told him about the turkeys or any other conversations. He had no first-hand knowledge of turkeys being exchanged in Vicksburg and could recall little else about the trip.

Dan McDonald did not have any first-hand knowledge of turkeys being given to Holmes in Vicksburg. Neither did he recall who told him about this or any other conversations during the trip. In fact, McDonald remembered little about the trip *except* that Holmes was taking turkeys to Hattiesburg for defendant. The Court has difficulty finding the testimony of Smith and McDonald credible.

Even if the Court accepted the testimony of these witnesses, defendant has still not proven that Holmes' testimony was perjured. Defendant testified at trial that he went turkey hunting every year and that he and Holmes had been to Vicksburg together more than once. The Court also notes that Holmes testified that he believed the phone call took place when defendant picked up his turkeys but was not sure of the exact date of the call. Holmes stated that he could be mistaken as to the exact date of the call but is certain it occurred prior to Fairchild's case being passed to the files.

The crucial testimony is Holmes' statement that the phone call preceded Fairchild's case being passed to the files. Holmes was corroborated on this point by Wiley Fairchild and Carroll Ingram. Holmes admitted uncertainty with respect to specific dates. Defendant has not

established that Holmes' testimony was perjured in any way and certainly not on the material testimony that the phone call preceded Fairchild's case being passed to the files. Accordingly, the Court will not grant defendant a new trial on this ground.

6. *Dental Records*

Defendant's final argument is that he should be granted a new trial because the government failed to produce dental records of defendant which reflect treatment received in Hattiesburg on May 14, 1982. Bud Holmes, of course, stated that his best recollection was that the phone call occurred on May 14, 1982 although he was not certain of that specific date and that "it could have been a different date."

Defendant argues that he should have received these records under Rule 16, F.R.Crim.P., because they were "material" to preparation of the defense. The government stated that it did not discover these records in their files until after trial when they were preparing for the post-trial evidentiary hearing.[7] The Court has heard arguments of counsel and considered this matter and has determined that whether or not the documents should have been produced with the Rule 16 production, defendant has not been prejudiced by nondisclosure. Indeed, the government was prejudiced by not having these records available at trial.

At trial, defendant tried to establish that he was in Biloxi on May 14, 1982. The dental records show he was in Hattiesburg at 3:00 p.m. receiving dental treatment. Although Holmes admitted the phone call from the farm could have occurred on another date, the government cer-

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[7] The Court finds that the goverment acted in good faith. These documents were certainly not hidden from defendant intentionally. In fact, the government's case would have been bolstered had the records been available for use at trial.

cainly was trying to show that it *could* have occurred on May 14. Hence, the dental records only help the government and hurt defendant. The Court fails to see how defendant was prejudiced by not receiving these records.[8]

The Court does not find that defendant was prejudiced in any way by the government's inadvertent failure to disclose these records. Accordingly, defendant's motion for a new trial on this ground is denied.

Conclusion

For the foregoing reasons, defendant's Motion for Judgment of Acquittal or, in the alternative, for a New Trial on Counts III and IV is denied.

/s/ James H. Meredith
United States District Judge

Dated: April 11, 1986

[8] The Court also notes that this is not a case where the documents were not disclosed prior to trial and were then used by the government at trial. As government counsel stated on the record, the government was prejudiced by not having these records at trial.

APPENDIX D

18 U.S.C. § 1623

False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand

jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

28 U.S.C. § 46(c)

§ 46. Assignment of Judges; Panels; Hearings; Quorum

* * * *

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc

court reviewing a decision of a panel of which such judge was a member.

28 U.S.C. § 291(a)

§ 291. Circuit Judges

(a) The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit where the need arises.

28 U.S.C. § 294(c)

§ 294. Assignment of Retired Justices or Judges to Active Duty

* * * *

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

28 U.S.C. § 296

§ 296. Powers Upon Designation and Assignment

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any

person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another distrist or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

FIFTH CIRCUIT RULE 35.6

35.6 Determination of Causes En Banc and Composition of En Banc Court. A cause shall be heard or reheard en banc when it meets the criteria for en banc set out in FRAP 35(a), and if a majority of the circuit judges who are in regular active service order that the appeal or other proceeding be heard or reheard en banc. For purposes of en banc voting under 28 U.S.C. § 46(c), the term "majority" is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service.

The En Banc Court shall be composed of all active judges of the Court. Any senior circuit judge of this circuit who sat as a member of the panel deciding the case being reviewed is eligible to participate, at his election, as a member of the En Banc Court. The election of a senior judge to become a member of the En Banc Panel shall be evidenced by a letter to the Chief Judge, with a copy to the clerk.

APPENDIX E

Transcript of Interview of
Judge Nixon on April 19, 1984

JN 58B-109

WHITE SPUNNER:—This is ah SA K. P. WHITE-SPUNNER, JR., and the time is ah 3:40 PM. This is April the 19th, 1984, and I'm in the chambers of U.S. District Court Senior Judge WALTER L. NIXON, JR., Chief Judge WALTER L. NIXON, JR., ah with REID WEINGARTEN of the U.S. DEPARTMENT OF JUSTICE, and we're all knowledgeable and agree that this conference will be tape recorded.

* * * *

[pp. 28-32]

W: Do you have any business relationships with him?
N: With BUD [Holmes]? No.
W: You're just good personal friends?
N: Uh huh.
W: Ah, has he ever discussed cases with you while he was DA?
N: What kind of cases?
W: His cases, the criminal cases in his court.
N: I think a few murder cases we discussed.
W: Now, the obvious question, Judge, did he ever discuss the DREW FAIRCHILD drug case with you?
N: Not to my recollection. I think I would recall it—
W: Okay.
N: If he had.
W: Sitting here now, and I know it's a long time ago—
N: Uh-huh—
W: I tell you that ah, the airport bust was August, 1980. Ah, that, I tell you that originally the case was a federal case, got passed to HOLMES.

N: How did it get passed, what, what happened?

W: Well—

N: I don't know anything about it—

W: Frankly, that's—

N: I'm, I'm, interested. I'm curious—

W: Frankly, that's a very good question, and it's quite a ah, what we're looking at here. Ah, I think it's fair to say that with the present administration there's a strong policy toward the federal government sharing its cases with local prosecutors, spread the wealth around so that—

N: I see—

W: The federal prosecutors get interested—

N: I see—

W: And I know that the present U.S. Attorney has a strong predilection in that direction. Now it could very well be ah that ah HOLMES wanted the case for purely legitimate reasons. And certainly (unintelligible)—

N: Was it passed while he was district attorney?

W: Yes, and he received the case, and ah I tell you again to this day, it has not been resolved. Ah, do you have any recollection of discussing that particular case with BUD HOLMES?

N: No.

W: As you sit here, do you have any notion as to who represented ah FAIRCHILD's son?

N: No. I don't know, much less any recollection.

W: Okay.

N: I don't know to this day, and I don't think I've ever known.

W: All right, let me tell you that of record, and I don't know what this means, but of record is an attorney named PORTER who I think was killed a short time ago—

N: BOB PORTER—

W: BILL PORTER?

N: BILL PORTER, right, I'm sorry, yeah, yeah.

W: Ah, this same series of questions—Did you know Mr. PORTER?

N: Yes.

W: He was, he was a practicing attorney in Hattiesburg.

N: Uh-huh—

W: And—

N: I didn't know him well. He just sat in my courtroom, or, or my chambers. I don't think he ever tried a case before me. I didn't know him very well.

W: So you knew him like you know every other attorney in Mississippi—

N: Correct, or even less ah, ah, ah—I'm, I didn't know him nearly as well as I do some attorneys.

W: And, obvious questions, Judge, did BILL PORTER ever come to you and discuss DREW FAIRCHILD?

N: Definitely not, absolutely not—

W: All right, and did the U.S. Attorney ah ever discuss the ah FAIRCHILD case with you?

N: Absolutely not.

W: I have to get a little (unintelligible)—

N: I understand, but I—

W: So (unintelligible)—

N: You know—

W: From the time of that bust until ba-basically me talking to you about the case—

N: Uh-huh—

W: You've had no connection, no knowledge of it, no participation in—

N: Correct—

W: The DREW FAIRCHILD case?

N: Absolutely, except something I read in the paper. It was either an editorial or state, or, or news article or something, a few years ago, I think—

W: To what effect—

N: About this case. I don't know. It was critical of the way it was handled or something.

W: Critical of the ah prosecutors?

N: Of, of, of- I, I, it was critical of the manner in which it was handled, something about ah it should be handled differently or he should be prosecuted, something should be done or he was being favored, or something to that effect. It was critical of the way in which it was handled, I believe. I, I'm pretty sure that I read that in, maybe in a Hattiesburg paper while I was holding court up there. It could have been the Jackson paper. I (unintelligible)—

W: Do you have the clue if the criticism was directed to the feds or to the locals?

N: To the best of my recollection, I think it was ah, ah, I think it was directed to the locals, to the, to, 'cause I never did know it was a federal case. I didn't know it had ever been in the federal system.

* * * *

[pp. 41-48]

W: Ah, I know that you were not prepared for this interview, and I know we're asking you about events—

N: (Unintelligible)

W: That took place a while ago. Is there anything that you know about this that should know—

N: Not that I can think of offhand because, you know, some time ago. Ah, I still would like to know exactly what it is alleged that I'm supposed to have done or not done in connection with this ah—

W: Well, frankly, we have no information that you—

N: You know—

W: That the case was in your court, that you did anything wrong with it—What we have—

N: That's, that's what puzzles me. How—

WS: It was in Judge COX's Court.

N: I see. Maybe Judge, maybe you oughta ask Judge COX (unintelligible)—

W: Well, he was never indicted. No, not Judge COX, believe me, Judge COX was never indicted. You would have heard about that.

N: (Laughter) No, but ah—

W: The other defendants in the ah, that were busted at the airport were assigned to Judge COX. They pled guilty. They were sent to prison. DREW FAIRCHILD was never indicted. His case got picked up by HOLMES, as I explained.

N: Why was it—Do you have any idea

W: Well, that—

N: Was it presented?

W: No, it was not presented.

WS: There was a, he reached a ah memorandum of understanding with the U.S. Attorney. (unintelligible) So far as to arrive at that—

N: Uh-huh

WS: And, along with his attorney, BILL POTTER, that was on November 19th, 1980—

N: Uh-huh—

WS: And the next significant thing that happened is he's indicted by a Forrest County Grand Jury in August of 1981. Some time between November of 1980 and August of 1981, that case, on DREW FAIRCHILD and another defendant who was a fugitive, was passed down to BUD HOLMES for handling.

W: Believe me. At this point we're not suggesting that there was impropriety in the U.S. Attorney's office or that there was impropriety by Mr. HOLMES. I mean, we have an allegation, and always in these cases are fervent hopes that there's a logical, reasonable, legitimate explanation for all of these events. And, and we're at the inception of it, and one of the reasons we came to you is because we're not gonna be scurrying around your neighborhood and not tell you about it—

N: Right. Well I'm puzzled. I, I just don't know anything about it. I, I'm, I'm, I'm learning something about it now.

W: Okay, so I'm—Just to complete the picture—

N: That's what I was, that's what I wanted to ask you, what allegation—I've never heard, you know, never had the case, never heard about the case except what I told you, and ah certainly had nothing to do with it.

W: Sure. To complete the picture—

N: I don't think I could have influenced Judge COX. Do you? (Laughter) I don't think. Think maybe Mrs. COX, maybe, maybe.

W: Just maybe.

N: Maybe—

W: Well anyway—

N: And certainly, but, but, but seriously, I, I, it's, you know, it's just ludicrous to say I've had anything to do with this thing.

W: Well, Judge COX never had DREW's case, just so we're clear on that. The case was never indicted. He had all the co-defendants.

N: Oh, he never was indicted?

W: He was never indicted federally.

N: That's what I'm talking about.

W: When the case got transferred to the DA's office in Hattiesburg, he was indicted—

N: Well, it was never presented to the Federal Grand Jury.

W: Right—

N: Well, that's what I asked awhile ago—

W: Right—

N: Was it ever presented. I mean the federal grand jury—

W: No—

N: Obviously you said he was indicted in the state—

W: Yes, right. It was never presented federally—

N: I see.

W: And he pled guilty in January, eighty-two—

N: Uh-huh—

W: In December, eighty-two, eleven months later, the case was passed to the files, ah it's returned the file, from

files to the active list, and he's never been sentenced. And of course now it's April, eighty-four.

N: Uh-huh—

W: You don't have to be a genius or a, a particularly sophisticated FBI Agent to wanna know why a case from August, eighty, has never been resolved to this day ah when the evidence appears to be extremely strong. That's the focus of the allegation. In addition, we received information from the same source that ah—I don't wanna use the word sweetheart, but the word imbalanced financial relationship developed between this Mr. FAIRCHILD, DREW's father, and you, the chief judge of the district—

N: Uh-huh—

W: So here we are. Okay—

N: I don't know what influence the chief federal, dis—U.S. District Judge could have with this case. When, when—

W: Well, he—

N: When was, when was it transferred to the state? I mean when was it presented to the state or when was he indicted?

W: August, eighty-one—

WS: Eighty-one—

N: August of eighty-one?

W: Right.

N: And it was in the federal system when, originally, when did—

W: August, eighty—

WS: August of eighty.

N: Okay.

WS: It was still in the federal system on November 19th, 1980, and it was some point after that it was transferred down to—

N: How was it transferred? I don't understand—

W: Well, that's—Transferred—And this, I, I, I'm hopeful, and there's a reasonable expectation that the

answer is simply that ah the U.S. Attorney and U.S. Attorneys elsewhere in the present administration—

N: Uh-huh—

W: Welcome the opportunity to share their cases—

N: Well, I understand—

W: And that may well have happend here—

N: Uh-huh—

W: And we're gonna pursue it if, if we possibly can. Judge, the backdating—I mean, I'm sure as an intelligent man, you can perceive the importance now. If you entered into a business relationship with FAIRCHILD in February of eighty, as the deeds and the note reflect, that took place before the bust.

N: Uh-huh.

W: If you took, entered into the relationship in eighty-one, it took place after the bust. People can draw any conclusions they want from that, but that's the chronology. That's why we have to get to the bottom of when things occurred.

N: I understand, but regardless, what connection have I had with ah FAIRCHILD's son's case? Isn't that the bottom line?

W: It, it basically—

N: I mean—

W: Could well be the bottom line.

N: Yeah, what, what—

W: And that's why—

N: Could I have conceivably done?

W: Well, that's why I had to ask you—

N: To influence the case Ah, I certainly didn't do a thing in the world. I don't know a thing about—But what could I have done?

W: Well, I mean, I don't know what you could have done. I mean it—

N: As United States District Judge.

W: If someone wanted to use their imagination, I suppose they, they could think of things, and, and I,

that's why we ask you the question did BUD HOLMES ever talk to you about the case?

N: Oh, no.

W: The answer is no. Did CARROLL INGRAM ever ask you about the case. The answer is no.

N: Right.

W: And did ah WILEY FAIRCHILD ever ask you to do anything.

N: No.

* * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SPECIAL GRAND JURY IMPANELED JULY 18, 1984

TESTIMONY OF JUDGE WALTER L. NIXON, JR.

Wednesday, July 18, 1984

Hattiesburg, Mississippi

(A QUORUM PRESENT)

* * * *

[pp. 45-53]

Q. Judge, as I discussed with you when we last met, of interest in this investigation is the drug case involving Wiley Fairchild's son. And I would like to ask you a few questions about that.

A. Be very happy to answer what I can.

Q. The grand jury has heard evidence that in August 1980 a plane landed, loaded with marijuana, at the Hattiesburg airport and that subsequent investigation caused law enforcement authorities to conclude that Drew Fairchild, the manager of that airport, played a part in that smuggling effort.

A. You told me that in our first interview in April of 1980—1984, this year.

Q. Right. When was the first time you became aware of that case?

A. I told you, and I'm repeating it, to the best of my recollection, I believe—I don't know whether I read about

it in the newspaper or heard about it or some—or heard it on TV. There was some criticism of the state's handling of that case in state court, by the news media. And I don't know when that was but I would assume it was just a couple of years ago.

Q. Okay. The grand jury has heard evidence that some of the people arrested at the scene were prosecuted federally and pled guilty and were sentenced, I believe, by Judge Cox—not by you, by Judge Cox—in federal district court in February of 1981. Would you have any knowledge of the progress of that case as it happened?

A. No, none whatsoever.

Q. Where does Judge Cox sit?

A. Judge Cox sits where he wants to sit. He sits in Jackson, Hattiesburg, Meridian, Biloxi and Vicksburg.

Q. And obviously—

A. I don't mean to be funny, but he's kind of like the 800 pound gorilla: he sits and does—where he wants to and kind of does what he wants to.

Q. But it's your testimony that whatever happened in his court, vis-a-vis this case, was unbeknownst to you?

A. Absolutely. And if you have any information to the contrary, I would like you to tell me and the grand jury now because I would like to ask.

Q. Well, obviously—

A. Because there is none.

Q. If you testify, Judge, that you didn't know, we'll accept your testimony.

A. Thank you. So we have that understanding.

Q. Eventually the case was indicted by the state. The grand jury's heard evidence to that effect. You testified that somehow, some way, there was some criticism of the way the state handled the case?

A. That's my best recollection.

Q. And your source of that information?

A. My what?

Q. Your source of that information?

A. As I've told you awhile ago, I either read something about it in the newspaper or heard something

about it on TV or someone told me they had read something about or heard something about it, I don't recall.

Q. The grand jury has heard evidence that the prosecutor, the state prosecutor, who eventually handled the case was an individual named Bud Holmes. Is he a friend of yours?

A. Very good friend of mine, long time friend, yes.

Q. Did he ever discuss the Drew Fairchild case with you?

A. No, not to the best of my recollection, I think I would recall if he had.

Q. Was the criticism directed—

A. And as you now, Mr. Weingarten, the federal government has nothing to do with a state court prosecution. Federal courts can't even interfer with an ongoing state ciminal case under the law, with one very narrow exception of bad faith as during the civil rights cases, problems, in Mississippi. The federal courts are prohibited, even if we were asked by properly filed proceeding, from interferring in any way or having any input or say so with reference to any state court—ongoing state court criminal action.

Do you agree with me or not? You're a good lawyer, I'm sure.

Q. Judge, I'm sure you can appreciate in a grand jury it's best to proceed with the prosecutor asking the questions.

A. Well, I understand. I'm not trying to be smart with you and I'm not trying to turn around and ask the questions, but I think the grand jury has a right to know what the law is as well as the facts.

Q. You understand that the United States has a—

A. I'm not arguing with you.

Q. —responsibility to provide the grand jury with all relevant law and facts.

A. All right.

Q. We take that responsibility very seriously.

A. I know, I don't question that. That's why I asked you, in all sincerity, if you know that under the *Younger*

versus Harris doctrine of the United States Supreme Court that that is the law. If you don't want to answer it, I'm sorry. I'm sorry I asked it, go ahead.

Q. Judge, was the criticism that you read about or heard about directed at Bud Holmes' handling of the Drew Fairchild case?

A. To the best of my recollection, it was.

Q. And what was the nature of the criticism?

A. I don't recall precisely but I think it related to the delay or that—or something to that effect. I don't—I don't recall. It didn't give much detail about it—

Q. All right.

A. —if I remember correctly. And I think I either read—I think I read in a newspaper. I think that's where I saw it. And whether it was Hattiesburg or Jackson *Clarion Ledger*, I don't recall.

Q. So we're just perfectly clear, that information did not come to you from Bud Holmes?

A. That's correct.

Q. Did Wiley Fairchild ever discuss the case with you?

A. No, not to the best of my recollection. I think I would recall that if he had, believe me, but I don't recall that he ever did.

Q. And accepting your answer as you state it, I need to ask the follow-up questions.

A. Very well.

Q. Did Wiley Fairchild ever ask you to do anything vis-a-vis his son's case?

A. Absolutely not.

Q. Did anyone on behalf of Wiley Fairchild ever ask you to do anything on behalf of his son's case?

A. Emphatically not.

Q. Did the U.S. Attorney in Jackson, Mississippi, or any of his subordinates, ever ask you or talk to you about the Wiley Fairchild case—excuse me, the Drew Fairchild case?

A. No, not—not before all this came up, when I asked them what this was all about. And, Mr. Wein-

garten, let me say this to you, and I think the grand jury should know this.

First of all, a federal judge has no authority, no power, no say-so, in who is or who is not prosecuted in federal court. That is the Department of Justice decision, your people you work for, either directly from Washington or through the United States Attorney's Office. They have the sole authority to decide whether to proceed against someone criminally in federal court or not. A federal judge has no say-so at all about that. Certainly he can't institute the action. That's up to the Department of Justice. And certainly he can't interfer with it. That's been—that's been determined when Judge Cox and former U.S. Attorney Robert Hauberg had a confrontation some many years ago, I think either right before or right after I went on the bench. And that was decided by the Fifth Circuit Court of Appeals, but, and of course, it was good law, good clear law.

But the Department of Justice has the sole discretion and responsibility and authority whether to indict somebody or charge them and proceed against them in federal court. The federal judge has no such authority, and I think we both know that. I'm not going to embarrass you by asking you if you agree with me because I don't want to look like I'm questioning you. But the grand jury should know that. Many people don't know that.

Q. Let me—maybe this will help. I assure you, Judge, at the end of the questioning, you'll have an opportunity to say whatever you want to say about it.

A. I understand, I'm trying to explain my answer. And if you disagree with me or disagree with what I'm stating, that about the law and the power and the authority of a federal judge and of the federal prosecutor, please say so and disagree with me because I don't want to give the grand jury any misleading or false information.

Q. Actually, I think it would be fruitful if we—if I confine my questions to asking factual questions.

A. All right, go ahead.

Q. I'm not even sure if the last question was answered. I'll ask it again.

A. All right.

Q. Did anyone from the U.S. Attorney's Office discuss the Drew Fairchild case with you prior to the August '81 indictment?

A. Absolutely not.

* * * *

[pp. 75-79]

MR. WEINGARTEN: All right. Judge, do you have anything you want to add?

THE WITNESS:

Yes, I do.

I want to say this. I—Here (indicating) are your notes too, copies of your instruments, rather.

I came here voluntarily and am very happy to cooperate with this grand jury and give them all the information that I have and that I could. And I have always thought everyone should do that, and that goes for the grand jury over which I'm supervising right now, the other federal grand jury that's sitting at this time. I have nothing at all to—had nothing to hide or nothing to withhold and I brought everything that you have asked me to bring.

And I want to say this. That I've been told and led to believe and read in the newspaper and heard on the news media so much about this is an investigation of the Drew Fairchild criminal case. Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court. I don't need to reconstruct anything with reference to that. I've told you that from the beginning.

I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case

in federal court. As you said, Judge Cox handled it. I don't know where—someone told me maybe Judge Russell handled one of the other defendants also and—but I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way influence anybody with respect to this case. Didn't know anything about it until I read that account in the newspaper. Didn't even know Mr. Fairchild had a son when I was dealing with him in the business transaction.

So I want to say that because I understand that's what this is all about. The investigation is apparently, if the news media is correct, and if I understand it correctly, that's what this is about, the Drew Fairchild criminal case.

And I want to say one other thing. I—it takes a lot of control on my part not to get—to say it any stronger. I very deeply resent any insinuation of any kind that I would do anything of that kind. Not only are there no facts to support it, but this has really—all of this has really hurt and caused pain to my children and my wife and myself, personally. It's an attack on my personal integrity and reputation and we have suffered through all this publicity and everything without any foundation or support of any kind in the way of evidence to support any such accusations of my having anything to do with this case.

But even above and beyond that, it's also an attack on the federal judiciary in the state of Mississippi, the federal judges. I've devoted 16 years, and I've been happy to do it and proud to do it, as United States district judge. My record is unblemished, I'm proud of it. And this has been a terrible thing on—attacking our reputation, tearing our reputation down, based on something like this, with no supportive evidence, after 12 years of—next week, of good, unblemished service. I have never done anything improper, illegal, unethical, and I don't intend to. So I resent it because it is a bad

reflection, all this type stuff, on the federal judiciary in the state of Mississippi.

But let me just say in parting, Mr. Weingarten and Mr. Richter, I even more—more am outraged by the insinuation that I would assist anyone involved in drug trafficking, bringing drugs into the state of Mississippi. I have taken care of those kinds of people who have come before me. Most of them are in the federal penitentiary. Most of them will be, go there. But to me that is as bad as someone going into a bank with a gun and robbing. I've got four children. I'm raising four little girls and I know what drugs do to people. I have seen it since I have been on the bench.

And I want to say this too. That I even resent it as much or more because I have always been of the opinion, and always will be, that the man who broke into my 70-year-old mother's home and murdered her in 1965 was either using drugs or broke in to get money to buy drugs. So I'm outraged and I really resent any such insinuation, that this kind of accusation has ever been made against me without supportive evidence.

I appreciate the opportunity to come before this grand jury and give them the facts and tell them how I feel and I appreciate your letting me do so.

* * * *

[pp. 95-96]

Q. Just getting back to the one question the juror asked.

A. All right.

Q. I'm not sure he's going to be satisfied. As you sat there in '81 and you saw that the deed or the notes reflected an '80 date, a year before, and the notes were for about ninety-five hundred dollars at 10 percent, I guess that's about a thousand dollars.

A. Nine hundred and fifty dollars.

Q. Nine hundred and fifty dollars, obviously. Why didn't you just pick up the phone to Wiley, if you had

this relationship, this on-going relationship, and just say correct it?

A. I—I've told you already I appreciated the man putting me in the thing. He asked me why, I told him. He said he thought it was a worthwhile project, he hoped—it was not a sure thing, it was a gamble, but that he would do it at—because of Carroll Ingram's request and because of my motivation.

Q. Okay.

A. And that's—that's the reason.

Q. Okay, we thank you for—

A. But—

Q. —for your testimony.

A. —I'm puzzled. Of course, I know why you're asking the question. But, as I understand it—well, go ahead. I've already answered your question.

Q. All right.

A. I thought this was an investigation of handling the Drew Fairchild case, which would be the only possible charge of a crime herein, federal crime, and I think I've answered that to your—

Q. Okay.

A. Unequivocally, I had nothing to do with that.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CR. No. H85-000 12(L)

UNITED STATES OF AMERICA

v.

WALTER L. NIXON, JR.

Violations: 18 U.S.C. § 201(g) (Gratuity)
18 U.S.C. § 1623 (Perjury)

[Filed Aug. 29, 1985]

INDICTMENT

The Grand Jury charges:

COUNT I

1. At all times material to this Indictment:

(a) The Defendant, WALTER L. NIXON, JR., was a United States District Court Judge in the Southern District of Mississippi.

(b) Wiley Fairchild was a businessman living in Hattiesburg, Mississippi.

(c) Paul H. "Bud" Holmes was an attorney in Hattiesburg, Mississippi and from January 1980 until Jan-

uary 1984, he served as the District Attorney for Mississippi's 12th District and had his office in Hattiesburg, Mississippi.

(d) Drew Fairchild was Wiley Fairchild's son and in August 1981 he was indicted by the State of Mississippi and charged with participating in a drug smuggling conspiracy at the Hattiesburg Airport in August 1980.

(e) Carroll Ingram was an attorney in Hattiesburg, Mississippi and represented Wiley Fairchild.

2. On or about February 25, 1981, the exact date being unknown to the grand jury, in the Southern District of Mississippi, the Defendant, WALTER L. NIXON, JR., unlawfully and knowingly did, directly and indirectly, accept, receive, and agree to receive things of value for himself otherwise than as provided by law for the proper discharge of his official duties; to wit, royalty interests in three wells, from Wiley Fairchild, for and because of official acts to be performed by the Defendant, WALTER L. NIXON, JR., in the future in matters of interest to Wiley Fairchild.

3. As part of said unlawful activity:

(a) The Defendant, WALTER L. NIXON, JR., made an initial request to Carroll Ingram that the Defendant, WALTER L. NIXON, JR., be placed in an oil and gas investment with Wiley Fairchild;

(b) The Defendant, WALTER L. NIXON, JR., subsequent to the initial request referred to in the previous paragraph, frequently and persistently urged Carroll Ingram to see to it that the Defendant WALTER L. NIXON, JR., was placed in an oil and gas investment with Wiley Fairchild;

(c) The Defendant, WALTER L. NIXON, JR., received mineral royalty interests from Wiley Fairchild worth far more than any consideration the Defendant,

WALTER L. NIXON, JR., agreed to pay for the interests;

(d) The Defendant, WALTER L. NIXON, JR., knew about and acquiesced in the backdating of the mineral royalty interests so as to make it appear that the Defendant, WALTER L. NIXON, Jr., had received oil and gas interests from Wiley Fairchild one year earlier than he actually had;

(e) The Defendant, WALTER L. NIXON, JR., knew about and acquiesced in the backdating of three promissory notes totalling $9,500 and made payable from the Defendant, WALTER L. NIXON, JR., to Wiley Fairchild so as to make it appear that the Defendant, WALTER L. NIXON, JR., had agreed to pay Wiley Fairchild $9,500 for the mineral royalty interests more than a year earlier than the time when the notes were actually prepared;

(f) The Defendant, WALTER L. NIXON, JR., advised Wiley Fairchild after receiving the mineral royalty interests that he would help Fairchild any time he could;

(g) The Defendant, WALTER L. NIXON, JR., paid off the three promissory notes totalling $9,500 to Wiley Fairchild only after receiving royalty payments of larger amounts from Wiley Fairchild; and

(h) The Defendant, WALTER L. NIXON, JR., to date has received over $60,000 in mineral royalties from still-producing wells given to him by Wiley Fairchild.

In violation of Title 18 United States Code 201(g).

COUNT II

1. Paragraph One of Count I is herein realleged and incorporated as if set forth in full herein.

2. On or about July 18, 1984, in Forrest County in the Hattiesburg Division of the Southern District of Mis-

sissippi, the Defendant, WALTER L. NIXON, JR., having duly taken an oath that he would testify truthfully in proceedings before a duly constituted grand jury of the United States, did knowingly and contrary to said oath make false material declarations as hereinafter set forth.

3. At the time and place set forth in paragraph two, the grand jury of the United States District Court for the Southern District of Mississippi was conducting an investigation into allegations of official corruption in the Southern District of Mississippi and as part of that investigation was examining, among other things, a) the circumstances of the transfer of mineral royalty interests from Wiley Fairchild to the Defendant, WALTER L. NIXON, JR., and b) the handling of the drug smuggling case involving Drew Fairchild by Paul H. "Bud" Holmes, then the District Attorney for Mississippi's 12th Judicial District.

4. It was material to the grand jury's investigation to determine:

(a) Whether or not the Defendant, WALTER L. NIXON, JR., discussed the drug case involving Drew Fairchild with Wiley Fairchild;

(b) Whether or not Wiley Fairchild asked the Defendant, WALTER L. NIXON, JR., to influence the handling of his son's case by interceding on his behalf with Paul H. "Bud" Holmes;

(c) Whether or not the Defendant, WALTER L. NIXON, JR., discussed the drug case involving Drew Fairchild with Paul H. "Bud" Holmes; and

(d) Whether or not the Defendant, WALTER L. NIXON, JR., sought to influence Paul H. "Bud" Holmes' handling of the Drew Fairchild drug case because the Defendant, WALTER L. NIXON, JR., had received mineral royalty interests from Wiley Fairchild.

5. At the time and place set forth in paragraph two, the Defendant, WALTER L. NIXON, JR., appearing as a witness under oath before the grand jury, was asked the following questions and gave the following answers, knowing the underscored material declarations to be false:

Q. Did Wiley Fairchild ever discuss the case with you?

A. *No, not to the best of my recollection.* I think I would recall that if he had, believe me, *but I don't recall that he ever did.*

Q. And accepting your answer as you state it, I need to ask the follow-up questions.

A. Very well.

Q. Did Wiley Fairchild ever ask you to do anything vis-a-vis his son's case?

A. *Absolutely not.*

6. The underscored material declarations made under oath before the grand jury by the Defendant, WALTER L. NIXON, JR., as set forth in paragraph five of this Count, as the Defendant, WALTER L. NIXON, JR., then and there well knew and believed, were false in that (1) the Defendant, WALTER L. NIXON, JR., had discussed Drew Fairchild's drug smuggling case with Wiley Fairchild; (2) the Defendant, WALTER L. NIXON, JR., had recalled those discussions with Wiley Fairchild at the time he testified before the grand jury; and (3) Wiley Fairchild had asked the Defendant, WALTER L. NIXON, JR., to help him with his son's drug case by influencing Paul H. "Bud" Holmes.

In violation of Title 18, United States Code, Section 1623.

COUNT III

1. Paragraph one of Count I and paragraphs two through four of Count II are herein realleged and incorporated as if set forth in full herein.

2. At the time and place set forth in paragraph two of Count II, the Defendant, WALTER L. NIXON, JR., appearing as a witness under oath before the grand jury, was asked the following questions and gave the following answers, knowing the underscored material declaration to be false:

> Q. The grand jury has heard evidence that the prosecutor, the state prosecutor, who eventually handled the case was an individual named Bud Holmes. Is he a friend of yours?
>
> A. Very good friend of mine, long time friend, yes.
>
> Q. Did he ever discuss the Drew Fairchild case with you?
>
> A. *No, not to the best of my recollection.* I think I would recall if he had.

3. The underscored material declarations made under oath before the grand jury by the Defendant, WALTER L. NIXON, JR., as set forth in paragraph two of this Count, as the Defendant, WALTER L. NIXON, JR., then and there well knew and believed, was false in that Bud Holmes and the Defendant, WALTER L. NIXON, JR., had discussed Drew Fairchild's drug smuggling case.

In violation of Title 18, United States Code, Section 1623.

COUNT IV

1. Paragraph one of Count I and paragraphs two through four of Count II are herein realleged and incorporated as if set forth in full herein.

2. At the time and place set forth in paragraph two of County II, the Defendant, WALTER L. NIXON, JR., appearing as a witness under oath before the grand jury, was asked the following question and gave the following response, knowing the underscored material declarations to be false:

MR. WEINGARTEN: All right. Judge, do you have anything you want to add?

THE WITNESS: Yes, I do.

I want to say this. I—Here (indicating) are your notes too, copies of your instruments, rather.

I came here voluntarily and am very happy to cooperate with this grand jury and give them all the information that I have and that I could. And I have always thought everyone should do that, and that goes for the grand jury over which I'm supervising right now, the other federal grand jury that's sitting at this time. I have nothing at all to—had nothing to hide or nothing to withhold and I brought everything that you have asked me to bring.

And I want to say this. That I've been told and led to believe and read in the newspaper and heard on the news media, so much about this is an investigation of the Drew Fairchild criminal case. *Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court.* I don't need to reconstruct anything with reference to that. I've told you that from the beginning.

I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where—someone told me maybe Judge Russell handled one of the other defendants also and—but *I never handled any part of*

it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way influence anybody with respect to this case. Didn't know anything about it until I read that account in the newspaper. Didn't even know Mr. Fairchild had a son when I was dealing with him in the business transaction.

So I want to say that because I understand that's what this is all about. The investigation is apparently, if the news media is correct, and if I understand it correctly, that's what this is about, the Drew Fairchild criminal case.

3. The underscored material declarations made under oath before the grand jury by the Defendant, WALTER L. NIXON, JR., as set forth in paragraph two of this Count, as the Defendant, WALTER L. NIXON, JR., then and there well knew, were false in that the Defendant, WALTER L. NIXON, JR., did have something to do with the Drew Fairchild drug case as he had sought to influence the case by asking state prosecutor Paul H. "Bud" Holmes to do what he could for Drew Fairchild and thereby handle the case in a way that would please Wiley Fairchild.

In violation of Title 18, United States Code, Section 1623.

A TRUE BILL:

/s/ David Mitchell Ward, Jr.
Foreman

/s/ Reid H. Weingarten
REID H. WEINGARTEN

Trial Attorney
Public Integrity Section
Criminal Division
Department of Justice
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No. 87-650

In the Supreme Court of the United States

OCTOBER TERM, 1987

WALTER L. NIXON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
JOHN F. DE PUE
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Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the question to which petitioner gave a false negative answer was sufficiently unambiguous to support a perjury conviction.

2. Whether the evidence was sufficient to support a perjury conviction.

3. Whether a suggestion for rehearing en banc is properly rejected when three judges vote against it, no judge votes for it, and eleven judges are recused.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction (Pet. App. 9a-28a) is reported at 816 F.2d 1022. The opinion of the court of appeals denying the petition for rehearing (Pet. App. 1a-8a) is reported at 827 F.2d 1019. The opinion of the district court (Pet. App. 29a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1987. A petition for rehearing was denied on September 8, 1987. The petition for a writ of certiorari was filed on October 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner, a federal district judge, was convicted on two counts of

making false material statements before a grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to concurrent five-year terms of imprisonment on each count. The court of appeals affirmed.

1. a. In August 1980, Drew Fairchild, the son of a successful investor named Wiley Fairchild, conspired with several others to pick up a load of marijuana in Colombia and fly it to the United States. Drew Fairchild's role in the scheme was to provide access to an airport for refueling the plane. The scheme was brought to a halt when the plane was intercepted by law enforcement officials at the airport. Pet. App. 10a.

A federal grand jury indicted three of the conspirators, but not Drew Fairchild, on August 19, 1980. Following that indictment, Drew Fairchild and his attorney, William Porter, went to Forrest County District Attorney Paul ("Bud") Holmes to discuss the situation. Holmes, in turn, sent them to United States Attorney George Phillips, who was prosecuting the indicted conspirators. After meeting with Phillips, Drew Fairchild agreed in writing on November 19, 1980, to plead guilty to federal felony charges and to cooperate with the government in exchange for a recommendation of a five-year suspended sentence and a $15,000 fine. Pet. App. 10a-11a. No charges were filed against Drew Fairchild at that time, however, and he did not enter the plea that he had negotiated.

In the following months, the federal prosecutors concluded that Drew Fairchild was not being completely cooperative. A federal prosecution against Drew Fairchild was considered. Tr. 148-149, 219-220, 238. Before any federal proceedings took place, however, District Attorney Holmes offered to take over the prosecution and seek indictments in state court (Tr. 220-221, 732-733). On August 26, 1981, Holmes obtained an indictment from a

[1] Petitioner was acquitted of a third count alleging that he had made a false statement to the grand jury, as well as a count alleging that, in violation of 18 U.S.C. (1982 ed.) 201(g) (now codified at 18 U.S.C. (Supp. IV) 201(c)(1)(B)), he had received an illegal gratuity.

state grand jury against Drew Fairchild and a co-defendant on charges stemming from the August 1980 drug-smuggling incident. Pet. App. 11a.[2]

Drew Fairchild agreed to testify against his co-defendant on the state charges in exchange for assurances from Holmes that he would receive probation and a $5000 fine on the state charges. On January 12, 1982, he entered a plea of guilty in state court. Sentencing was postponed several times, however. On December 23, 1982, Holmes moved successfully to have Drew Fairchild's case "passed to the file," a procedure that places a pending case in an inactive status and typically results in its termination. Because of media publicity, however, the case was recalled to the active file just a few weeks later. Nevertheless, the case was continued, without sentencing, throughout 1983 and 1984. Pet. App. 11a-12a.

b. Petitioner, seeking a source of income to augment his salary as a federal judge, had made lucrative investments in oil and gas properties through the intercession of Wiley Fairchild, Drew Fairchild's father (Pet. App. 10a).[3] Petitioner was also a good friend of Holmes (*id.* at 14a, 57a).

Sometime after Drew Fairchild's January 1982 plea of guilty in state court, Wiley Fairchild turned to petitioner for help in dealing with Holmes (Pet. App. 14a). During a meeting in Wiley Fairchild's office, Wiley Fairchild told

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[2] Holmes thought (correctly as it turned out) that indicting Drew Fairchild would help Holmes's friend Porter to collect the legal fee that he sought for his services to Drew Fairchild (Pet. App. 11a).

[3] Both petitioner and Wiley Fairchild were indicted on federal charges on the theory that these investments, some of which were made after Drew Fairchild's troubles began, amounted to an unlawful gratuity paid by Wiley Fairchild to petitioner. As petitioner notes (Pet. 6 n.2), Wiley Fairchild pleaded guilty to paying an illegal gratuity to petitioner, but petitioner was acquitted at trial on the gratuity charge.

petitioner about Drew Fairchild's agreement with Holmes, and he expressed the opinion that Holmes was picking on Drew Fairchild because of Wiley Fairchild's wealth (Tr. 480-484). Petitioner testified at trial that during this meeting he " 'got the impression that [Fairchild] wanted me to mention something about [the case] to Bud Holmes' " (Pet. App. 15a).

Petitioner then visited Holmes in his office, and the two drove to Holmes's farm. According to Holmes's later testimony, petitioner stated during the trip that he had visited Wiley Fairchild and that Fairchild had asked him " 'to put in a good word for his boy, or would I say something to you about Drew' " (Pet. App. 15a). Holmes responded by inquiring what Wiley Fairchild wanted (*ibid.;* Tr. 736, 737). When petitioner reiterated that he was simply " 'put[ting] in a good word' " and not asking Holmes to do anything, Holmes volunteered, " 'I'm district attorney, I'll pass it to the files' " (Pet. App. 16a). Petitioner replied, " 'I'm not asking you to do anything now' " (*ibid.*).

Holmes testified that he informed petitioner of the plea agreement that he had reached with Drew Fairchild's attorney (Pet. App. 17a). According to both Holmes (*ibid.*) and Wiley Fairchild (*id.* at 21a), petitioner then telephoned Wiley Fairchild from Holmes's farm and said either that Drew Fairchild " 'isn't going to jail' " (*id.* at 17a) or that " 'everything [is] going to be taken care of to your satisfaction' " (*id.* at 21a). According to Holmes, petitioner also expressed appreciation for Wiley Fairchild's assistance in making investments (*id.* at 17a). Holmes then got on the phone. According to Wiley Fairchild, Holmes said, " 'when this man asks me to do something, I don't ask no questions, I just go ahead and do it' " (*id.* at 22a). According to Holmes's testimony, petitioner's conversation with him subsequently "caused enough influence on [him] to go ahead and do what I did,"

that is, pass the case to the file (Tr. 938, 942; see also Tr. 754).

c. On November 3, 1983, an attorney who had worked for Wiley Fairchild telephoned the FBI and alleged that Wiley Fairchild had conveyed mineral rights to petitioner in exchange for his intercession in the drug case involving Wiley Fairchild's son (Tr. 273, 300, 315-319, 347). In connection with an investigation of the allegation, a federal prosecutor interviewed petitioner on April 19, 1984. After the prosecutor outlined to petitioner the chronology of events relating to the case, petitioner denied having any knowledge of the case; denied that Holmes had ever talked to him about the case; and denied having been asked by Wiley Fairchild to intercede on behalf of his son (Pet. App. 50a, 53a-54a). Shortly thereafter, petitioner spoke with Holmes, denied having talked with anyone about the Drew Fairchild case, and inquired whether his phone call to Wiley Fairchild from Holmes's farm had been recorded (Tr. 758-759).

A federal grand jury began an investigation of the matter. On July 18, 1984, petitioner testified before the grand jury. The prosecutor explained that the case involving Drew Fairchild had been "indicted by the state." Petitioner agreed with the prosecutor that there had been "some criticism of the way the state handled the case." The prosecutor also stated that Holmes was the state prosecutor who handled the case, and petitioner described Holmes as his "long time friend." Immediately after this background discussion, the prosecutor inquired whether Holmes, the state prosecutor, had "ever discuss[ed] the Drew Fairchild case with" petitioner. Petitioner responded that, to the best of his recollection, he had not. He then immediately explained that "the federal government has nothing to do with a state court prosecution. * * * The federal courts are prohibited, even if we were asked by properly filed proceedings, from interfering in any way or having any input

or say so with reference to any state court—ongoing state court criminal action." Pet. App. 56a-57a.[4]

The prosecutor then asked petitioner further questions about "the criticism that you read about or heard about directed at Bud Holmes' handling of the Drew Fairchild case" (Pet. App. 58a). Petitioner acknowledged having read such criticism in a newspaper, and he was then asked, "Did Wiley Fairchild ever discuss the case with you?" (*ibid.*). Petitioner denied that any such discussion had taken place, and, when he was asked whether "Wiley Fairchild ever ask[ed] you to do anything vis-a-vis his son's case," petitioner replied, "Absolutely not" (*ibid.*).

At the conclusion of his grand jury testimony, petitioner was asked if there was anything he wanted to add. Petitioner then made the following statement (Pet. App. 60a-61a):

> I've been told and led to believe and read in the newspaper and heard on the news media so much about this is an investigation of the Drew Fairchild criminal case. Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court. I don't need to reconstruct anything with reference to that. I've told you that from the beginning.
>
> I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where—someone told me maybe Judge Russell handled one of the other defendants also and—but I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or

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[4] To reinforce this point, petitioner made reference (Pet. App. 57a-58a) to the docrine of *Younger* v. *Harris*, 401 U.S. 37 (1971).

judge, in any way influence [*sic*] anybody with respect to this case.

d. In March 1985, many months after petitioner gave this testimony, something finally happened in Drew Fairchild's long-pending case in state court. The judge to whom the case had been reassigned announced that he would not honor Drew Fairchild's plea agreement with District Attorney Holmes. Pet. App. 12a. On March 29, 1985, Drew Fairchild was for the first time indicted on federal charges stemming from the August 1980 conspiracy to smuggle marijuana (*id.* at 10a). He entered a guilty plea in federal court and was sentenced to six months in prison (*id.* at 12a).

2. On August 29, 1985, the grand jury indicted petitioner on one count of accepting a gratuity (Count I) and on three counts alleging that he had made false statements during his appearance before it (Counts II-IV). Count II alleged that he had testified falsely that Wiley Fairchild had never discussed the case with him and that Wiley Fairchild had never asked him to do anything vis-a-vis Drew Fairchild's case. Count III alleged that petitioner had testified falsely in denying that District Attorney Holmes had ever discussed "the Drew Fairchild case" with him. Count IV alleged that petitioner had testified falsely that he had "had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court" and that he had "never talked to anyone, state or federal, prosecutor or judge, in any way [to] influence anybody with respect to this case." Count IV alleged that that testimony was false because petitioner, in fact, "did have something to do with the Drew Fairchild drug case as he had sought to influence the case by asking state prosecutor Paul H. 'Bud' Holmes to do what he could for Drew Fairchild and thereby handle the case in a way that would please Wiley Fairchild." Pet. App. 64a-71a (emphasis omitted).

At trial, the jury returned verdicts of guilty on Counts III and IV. It acquitted petitioner on Counts I and II. The district court denied petitioner's post-trial motion for a judgment of acquittal (Pet. App. 29a-41a). Among other things, the court rejected petitioner's contention that the evidence was insufficient to support the convictions on Counts III and IV, observing that "there was ample evidence from which a jury could find guilt beyond a reasonable doubt on Counts III and IV" (*id.* at 31a).

2. A panel of the court of appeals, consisting of two Fifth Circuit judges and a judge of the Second Circuit sitting by designation, unanimously affirmed, also rejecting petitioner's claims regarding the sufficiency of the evidence. In particular, the court of appeals rejected petitioner's argument that the question whether he had ever discussed the Drew Fairchild case with Holmes was ambiguous. Pet. App. 9a-26a.[5]

Petitioner then filed a petition for rehearing with a suggestion for rehearing en banc. Of the 14 active judges on the court of appeals, 11 were recused (Pet. App. 2a & n.1). Because, under Fifth Circuit Rule 35.6 (see *id.* at 45a), rehearing en banc is granted only on a favorable vote of a majority of all active judges, and not just a majority of all nonrecused judges, it was impossible that petitioner's suggestion of rehearing en banc would succeed under Rule 35.6. While the suggestion was pending, petitioner and the government both filed memoranda addressing the procedure for handling the suggestion of rehearing en banc.

Petitioner suggested that rehearing en banc should be granted if a majority of the nonrecused judges in regular active service voted in favor of rehearing en banc. Alternatively, he maintained that the number of judges voting

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[5] The court of appeals also rejected petitioner's claims of prosecutorial misconduct, improper denial of a bill of particulars, improper failure to sever or dismiss the gratuity count, and evidentiary error (Pet. App. 26a-28a).

on whether to rehear the case en banc should be enlarged by a waiver or withdrawal of recusals, the designation of senior judges to vote, or the assignment of judges from other circuits. Pet. App. 2a-4a & n.2.

All three members of the panel voted to deny rehearing. In addition, none of the three nonrecused active judges of the court of appeals called for a vote on the suggestion of rehearing en banc, and all three indicated that they would vote against rehearing en banc if a poll were taken (Pet. App. 1a-2a, 3a n.3, 4a-5a).[6] All 11 recused judges maintained their recusals (*id.* at 3a n.2, 4a n.4). The court rejected petitioner's suggestion that senior judges or judges from other circuits vote on the rehearing suggestion, on the ground that there is no statutory authority for such a procedure (*id.* at 5a-6a). The court also rejected petitioner's suggestion that the Constitution required such a procedure regardless of the lack of statutory authority (*id.* at 6a-7a). Finally, the court observed that, although petitioner had characterized his contentions otherwise, any error in the panel opinion "would at most amount to one of misapplication of precedent to the facts at hand" and thus would not present the kind of issue worthy of en banc consideration (*id.* at 8a).

ARGUMENT

1. Relying on *Bronston* v. *United States*, 409 U.S. 352 (1973), petitioner contends (Pet. 14-18) that the question whether District Attorney Holmes had ever discussed "the Drew Fairchild case" with him was so ambiguous that his conviction on the count alleging the falsity of his denial that such a discussion occurred should be reversed. That

[6] The court also indicated that it would abide by Rule 35.6 even if a majority of the nonrecused judges had voted in favor of rehearing en banc (Pet. App. 4a).

fact-bound claim was properly rejected by the court below and does not warrant further review.[7]

In *Bronston,* 409 U.S. at 359, the Court held that the perjury statute did not embrace a literally true but unresponsive answer, even though the answer was arguably misleading by negative implication. The Court reasoned that a perjury conviction must rest on the utterance by the accused of a false statement and not on the particular interpretation that the questioner or factfinder places on an answer (*id.* at 360).

This case is a far cry from *Bronston.* The statement alleged to be perjurious in *Bronston* was "[t]he company had an account there [in Switzerland] for about six months, in Zurich"—a statement that was absolutely true but happened to be unresponsive to the question asked, which was whether Bronston himself had ever had a Swiss bank account (409 U.S. at 354). Petitioner, by contrast, did not make a true but unresponsive statement; he simply denied that Holmes had "ever discuss[ed] the Drew Fairchild case" with him (Pet. App. 57a). And Holmes *had* discussed the Drew Fairchild case with petitioner.

Petitioner's real argument is not that his denial of having ever discussed the Drew Fairchild case with Holmes was literally true, as in *Bronston,* but that he could have taken the question as an inquiry only into his discussions with Holmes (a state prosecutor) of the *federal* authorities' handling of matters relating to Drew Fairchild. In making that argument, petitioner seeks to draw on cases from the

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[7] Petitioner also suggests that the court below has held "that juries may decide perjury charges even when the question was ambiguous" (Pet. 16) and that there is sharp division among the lower courts on that question. Petitioner's premise is false, however. Far from holding that there was an ambiguous question in this case but that the issue should go to the jury, the court of appeals held that there was no ambiguous question in this case. The court of appeals specifically stated, "There is certainly no ambiguity in the question, 'Did [Holmes] ever discuss the Drew Fairchild case with you?' " (Pet. App. 24a).

lower courts in which perjury convictions have been reversed because, although the answers given to particular questions have been responsive, the questions themselves have been reasonably susceptible to constructions under which the answers given were true.

Those cases hold that, when a line of questioning is so vague as to be fundamentally ambiguous, the answers associated with the questions posed may be insufficient as a matter of law to support a perjury conviction. See, *e.g.*, *United States* v. *Lighte*, 782 F.2d 367 (2d Cir. 1986). As the court explained in *Lighte*, 782 F.2d at 375 (citations omitted):

> A question is fundamentally ambiguous when it "is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." * * * When ambiguity in questioning is raised, the "defense . . . may not be established by isolating a statement from context, giving it in this manner a meaning entirely different from that which it has when the testimony is considered as a whole."

In assessing whether a question is fundamentally ambiguous, an appellate court has the limited role of determining whether, when considered in context, the question asked was " 'subject to a reasonable and definite interpretation by the jury.' " *United States* v. *Chapin*, 515 F.2d 1274, 1280 (D.C. Cir.) (quoting *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965)), cert. denied, 423 U.S. 1015 (1975); see *United States* v. *Lighte*, 782 F.2d at 372.

Petitioner maintains that the question whether he discussed "the Drew Fairchild case" with District Attorney Holmes was ambiguous because, from the context of the question, he could reasonably have construed it to relate

only to the *federal* authorities' actions concerning Drew Fairchild (Pet. 16). Such a construction, however, " 'isolat[es] [the] statement from [its] context, giving it * * * a meaning entirely different from that which it ha[d] when the testimony is considered as a whole' " (*Lighte,* 782 F.2d at 375). It also ignores the parts of petitioner's testimony that demonstrate that, whether or not he *could* have understood the question to refer to a federal "Drew Fairchild case," he did not in fact so understand the question.

The prosecutor introduced the topic of petitioner's discussion with Holmes by reminding him that he had testified that "there was some criticism of the way the *state* handled the case." The prosecutor then added that "[t]he grand jury has heard evidence that the prosecutor, *the state prosecutor*, who eventually handled the case was an individual named Bud Holmes." He then inquired whether Holmes "ever discuss[ed] the Drew Fairchild case with you." Pet. App. 56a-57a (emphasis added). In this context, it was readily apparent that the prosecutor's question was directed toward the state prosecution; indeed the question would have made no sense if it had referred to the federal authorities' handling of the matter. This is especially so because at the time of petitioner's grand jury testimony there never had been a "Drew Fairchild case" in federal court. There had only been a prosecution in which Drew Fairchild was an unindicted co-conspirator, and a pre-indictment plea agreement between Drew Fairchild and the federal prosecutor.[8]

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[8] Petitioner also errs in suggesting that the term "discuss" as used in the question was ambiguous because it can imply an extensive exploration of a subject rather than a passing exchange (Pet. 16 n.6). As the court below observed in rejecting this claim, " '[w]ords that are clear on their face are to be understood in their common sense and usage' " and, therefore, do not require further definition. Pet. App. 25a

It is also readily apparent that petitioner construed the question to refer to the state prosecution. Immediately after responding to the question in the negative, petitioner explained that "the federal government has nothing to do with a state court prosecution * * * [and federal courts] are prohibited * * * from interfering in any way or having any input or say so with reference to any state court—ongoing state court criminal action" (Pet. App. 57a). Petitioner thus made it quite clear that he understood that the "Drew Fairchild case" being discussed in his grand jury testimony was the state-court prosecution.

2. Petitioner also contends (Pet. 18-21) that the evidence relating to Count IV failed to establish the assertion in the indictment that he "sought to influence the [Drew Fairchild] case by asking * * * Holmes to do what he could for Drew Fairchild" (Pet. App. 71a). Concomitantly, petitioner contends that the evidence failed to establish the falsity of his statements that "I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court" and that "I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way influence [*sic*] anybody with respect to this case" (*id.* at 60a, 61a). This challenge to the sufficiency of the evidence was explicitly resolved against petitioner by both courts below (see *id.* at 23a-25a, 30a-31a) and warrants no further review by this Court. In any event, it is without merit.

(quoting *United States* v. *Fulbright*, 804 F.2d 847, 851 (5th Cir. 1986)). In any event, it is clear from the record that petitioner's discussion of the Drew Fairchild case with Holmes was not merely a passing exchange. It began in Holmes's office, continued during a drive to Holmes's farm, and culminated in the telephone call made to Wiley Fairchild from Holmes's farm (see Pet. App. 15a-18a).

In the context of a perjury prosecution, the indictment must set out the alleged perjurious statement and the objective truth in stark contrast, so that the claim of falsity is clear. See, *e.g., United States* v. *Cowley,* 720 F.2d 1037, 1042 (9th Cir. 1983), cert. denied, 465 U.S. 1029 (1984); *United States* v. *Tonelli,* 577 F.2d 194, 195 (3d Cir. 1978). But "it is not necessary to prove the *exact* words of the accused in giving the false testimony, it being sufficient to prove substantially what he said." *United States* v. *Laite,* 418 F.2d 576, 580 (5th Cir. 1969). Thus, "[t]he exact words charged in the indictment need not be proved; if the charge is substantially proved, any variance is immaterial"(*ibid.*).

In this case, petitioner's testimony before the grand jury that he did not attempt to influence anyone with respect to the case does, in fact, stand in stark contrast with the allegation that he sought to influence the case by asking Holmes to do what he could for Drew Fairchild. And the proof of that allegation at trial was sufficient to allow the jury to find that it was true. Holmes testified that, during his meeting with petitioner, petitioner stated that, although he did not wish Holmes to do anything wrong, he was " 'just saying that Mr. Fairchild asked [him] to put in a good word' " for his son, Drew (Pet. App. 16a). That petitioner intended his "good word" on Drew Fairchild's behalf to influence Holmes's disposition of the case, despite his assertion to the contrary, is demonstrated by his ensuing call to Wiley Fairchild informing him that " 'everything [is] going to be taken care of to your satisfaction' " (*id.*. at 21a) and Holmes's statement to Wiley Fairchild in petitioner's presence that " 'when [petitioner] asks me to do something, I don't ask no questions, I just go ahead and do it' " (*id.* at 22a). Finally, the purpose of petitioner's request to Holmes is evidenced by a subsequent statement to Carroll Ingram, Wiley Fairchild's attorney, in which petitioner said that he had spoken to Holmes about Drew Fairchild's case and Wiley Fairchild's request, and

that Holmes had said that he would consider the request (Tr. 1070).[9]

3. Finally, petitioner claims (Pet. 21-25) that the operation of Fifth Circuit Rule 35.6 denied him a fair opportunity to have his suggestion for rehearing en banc considered by the court because it was impossible, unless recusals were withdrawn or additional judges were designated to vote on the suggestion, to secure the necessary majority vote of all judges in regular active service. Petitioner correctly notes (Pet. 22) that some courts of appeals permit rehearing en banc on the favorable vote of a majority of the nonrecused judges, although most courts of appeals do not. Petitioner does not claim that any court of appeals has ever allowed senior judges who were not members of the panel or judges from other circuits to vote on suggestions of rehearing en banc, or that there is statutory authority for such a procedure, although he contends that the Constitution requires such a procedure in the circumstances of this case.

Petitioner's contention that this Court should require a court of appeals to convene en banc when a majority of nonrecused judges vote in favor of rehearing en banc is purely academic. All three nonrecused judges of the court

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[9] Petitioner also claims that his statement that "I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court" (Pet. App. 60a) was literally true because "[t]he last phrase * * * *must* be read to modify the entire statement, and it is indisputable that [petitioner] played no role in Drew's case 'in' any court" (Pet. 20 (emphasis added)). There is no reason, however, why the sentence must be read in the unnatural way suggested. It was well within the province of the jury to interpret petitioner's words to mean what they seem to say, *i.e.*, that petitioner had nothing whatsoever, officially or unofficially, to do with any criminal case brought in federal court or in state court against Drew Fairchild. Because petitioner did have something "to do" with the state criminal case "unofficially," *i.e.*, he discussed the matter with Holmes, the jury had an ample basis to conclude that petitioner's statement was false.

of appeals opposed rehearing en banc in this case. Thus, even if this contention had merit, it would not help petitioner. In any event, the contention lacks merit.[10]

Petitioner's contention that the Constitution required the court of appeals to go even further and find additional judges to vote on the suggestion of rehearing en banc is supported by no authority and is without merit. As the Court explained in *Western Pac. R.R. Corp.* v. *Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953):

> In our view, [the en banc statute] is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its

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[10] In this Term alone there have been before this Court two cases in which the requirement of the vote of a majority of judges in regular active service, rather than just a majority of the voting judges, has worked to the detriment of the government. Because the teachings of this Court are clear—it is for the courts of appeals, not this Court, to fashion en banc procedures—we have refrained from petitioning on that issue in one case and have affirmatively urged the Court not to review the issue in the other case. See *Abourezk* v. *Reagan*, No. 84-5673 (D.C. Cir. May 23, 1986) (order denying government's suggestion for rehearing en banc despite favorable vote of five out of nine voting judges), aff'd by an equally divided Court, No. 86-656 (Oct. 19, 1987); *In re Ahlers*, 794 F.2d 388, 415 (8th Cir. 1986) (suggestion for rehearing en banc, supported by United States as amicus curiae, denied despite favorable vote of five out of nine voting judges), cert. granted *sub nom. Norwest Bank Worthington* v. *Ahlers*, No. 86-958 (June 22, 1987). We are serving on petitioner's counsel a copy of our amicus curiae brief at the petition stage in *Ahlers*, in which, although we expressed strong disagreement with the court of appeals on the merits, we also noted (at 9 & n.3) that the issue concerning en banc procedures was insubstantial. This Court's grant of certiorari in *Ahlers* was limited to one issue on the merits.

own administrative machinery to provide the means whereby a majority may order such a hearing.

Accord *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 624-625 (1974); *Shenker* v. *Baltimore & O.R.R.*, 374 U.S. 1, 4-5 (1963).[11] The en banc procedure that Congress has authorized, therefore, is fundamentally different from the right to appeal, which—although not constitutionally required—must meet constitutional demands if the legislature does provide it. No litigant has a constitutional right to any particular procedures in the consideration of a suggestion for rehearing en banc.

Petitioner's suggestion of rehearing en banc was reviewed by three circuit judges, all of whom concluded that it was without merit. He was not entitled to anything more.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General
WILLIAM F. WELD
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DECEMBER 1987

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[11] This Court also explained in *Moody*, 417 U.S. at 626, that the express language of 28 U.S.C. 46(c) "confines the power to order a rehearing in banc to those circuit judges who are in 'regular active service.' * * * [N]either the Court nor Congress has suggested that any other than a regular active service judge is eligible to participate in the making of the decision whether to hear or rehear a case in banc."

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Walter L. Nixon, Jr. makes the following reply to the Brief for the United States:

1. The government's brief deals only glancingly with the key legal issue whether a perjury conviction may be based upon a response to an ambiguous question when the response was literally true under a reasonable understanding of the question. This issue was reserved in *Bronston v. United States*, 409 U.S. 352 (1973), and there is a square conflict among the circuits on it. *See* Petition for Certiorari, at 15-16.

The government incorrectly implies that the courts that have reversed perjury convictions based on ambiguous

questions have adopted the Second Circuit's view that the question must be "fundamentally ambiguous." *See* Gov't Br. at 11, discussing *United States v. Lighte*, 782 F.2d 367 (2d Cir. 1986). In fact, none of the other four circuits and two states has adopted that "fundamentally ambiguous" standard. *See* cases cited on pp. 15-16 of Petition for Certiorari. Similarly, the government incorrectly suggests that the Second Circuit's standard was elucidated by the D.C. Circuit in *United States v. Chapin*, 515 F.2d 1274, 1280 (D.C. Cir), *cert. denied*, 423 U.S. 1015 (1975). In fact, those two courts are in direct conflict on this issue. *Chapin* held that a jury may convict for perjury even when the question "may have a number of interpretations," and thus *Chapin* allowed "the jury to determine that the question *as the defendant understood it* was falsely answered." *Id.* (emphasis in original). The Second Circuit in *Lighte* refused to allow the jury to make that determination if the question was fundamentally ambiguous.

2. The government attempts to portray the Petition as presenting only a factual dispute over Count III of the indictment. The government argues that the full context of Nixon's testimony makes clear that Nixon could not have understood the term "Drew Fairchild's case" to refer to federal (as opposed to state) proceedings involving Drew Fairchild. Gov't Brief, at 11-13. But it is the government that ignores the full context of Nixon's testimony.

The investigation of Nixon was prompted by an allegation that Nixon had steered the Drew Fairchild case from federal to state authorities. Tr. 316-18, 347. When Nixon was interviewed by the prosecutor in April of 1984, the prosecutor stated that he was investigating how Drew Fairchild's case "got passed" from federal to state authorities. Pet. App. 46a-47a. The interview returned to that subject several times. *Id.* at 49a, 50a, 52a.

Consequently, when Nixon was asked before the grand jury if he had discussed "Drew Fairchild's case" with state prosecutor Holmes, Nixon reasonably understood the question to address whether Nixon had discussed with Holmes how the federal case was steered into state hands. Nixon told the grand jury that the federal courts have no involvement in state prosecutions, and then added (in a passage ignored by the government's brief) that the federal courts also have no involvement in federal prosecutorial decisions. Pet. App. 57a-59a. The entire sequence of testimony reflects Nixon's understanding—first established by the prosecutor's own statements in the April interview—that the prosecutor was asking about how "Drew Fairchild's case" "got passed" from federal to state authorities.

Finally, the government argues that the term "Drew Fairchild's case" could not have referred to any federal action "because at the time of petitioner's grand jury testimony there never had been a 'Drew Fairchild case' in federal court." Gov't Br. at 12. This contention is contrary to the common parlance of attorneys and is contradicted by the prosecutor's statements in the April 1984 interview.

The federal prosecutor told Nixon in April that the Drew Fairchild prosecution "originally . . . was a federal *case*," Pet. App. at 46a, that Drew's "*case* got picked up" by the state prosecutor, *id.* at 50a, and that sometime between November of 1980 and August 1981, "that *case*, on DREW FAIRCHILD and another defendant who was a fugitive, was passed down . . . ." *Id.* The prosecutor added that "[Federal District] Judge COX never had DREW's *case*, . . . The *case* was never indicted [in federal court]." *Id.* at 51a (emphases supplied). Thus, in five separate instances the federal prosecutor used the term "case" to describe federal pre-indictment activities concerning Drew Fairchild, and that

is precisely what Nixon understood that term to mean when he testified before the grand jury.[1]

3. The Petition's second question concerns whether the government proved the truth assertion of Count IV, that Nixon sought to influence state prosecutor Holmes' handling of Drew Fairchild's case. The government now argues that such proof was established by (i) Nixon's call to Wiley Fairchild to describe Drew's preexisting plea agreement and (ii) Holmes' statement to Wiley that Holmes does whatever Nixon asks. Gov't Br. at 14. But Nixon's description to Wiley of the preexisting plea agreement cannot prove that Nixon attempted to influence Holmes, particularly since Nixon had no influence on the plea agreement which had been implemented when Drew Fairchild pled guilty at least four months earlier. And Nixon's flat disavowals of an intent to influence Holmes—which are established through the testimony of the government's own witness, Holmes—cannot be contradicted by Holmes' admittedly "misleading" statement to Wiley that he does whatever Nixon asks. Tr. 740.[2]

4. On the third question, concerning the Fifth Circuit's en banc procedures, the government offers no reasoning or analysis, but only the flat *ipse dixit* that the

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[1] On an unrelated point, the government misstates the record when it suggests that "some" of Nixon's investments with Wiley Fairchild "were made after Drew Fairchild's troubles began." Gov't Br. at 3, n.3. It is uncontradicted that all three investments were concluded in February 1980, Tr. 1044, 1118, 1053, 593-94, while Drew Fairchild's legal problems did not arise until August 1980.

[2] The government also misstates Holmes' testimony when it asserts that, while visiting Holmes, Nixon "reiterated that he was simply 'put[ting] in a good word' and not asking Holmes to do anything." Gov't Br. at 4. According to Holmes, however, Nixon stated only that Wiley Fairchild had asked him to put in a good word. Pet. App. at 16a. No one ever testified that Nixon stated —much less reiterated—that he actually was "put[ting]" in a good word. Pet. App. at 15a-16a.

"en banc procedure that Congress has authorized, therefore, is fundamentally different from the right to appeal." Gov't Br. at 17. En banc review, of course, differs from direct appeal because it is discretionary. But that distinction is irrelevant to petitioner's claim that he is entitled to a fair opportunity to win en banc review, just as he is entitled to a fair direct appeal. In this case, only three Fifth Circuit judges (two of whom had served on the original panel) were not recused from the en banc proceeding. Because eight votes were needed for Nixon to win en banc review, he was denied his constitutional right to a fair opportunity to win en banc review.

CONCLUSION

For all of these reasons, and the reasons stated in the initial petition for certiorari, the petition should be granted.

Respectfully submitted,

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